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Supreme Court, U.S.

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**APPENDIX**

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**Supreme Court of the United States**

**OCTOBER TERM, 1969 / 1970**

**No. 2 [REDACTED] 124**

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**WILLIE S. GRIGGS, ET AL.,  
PETITIONERS**

**vs.**

**DUKE POWER COMPANY, A CORPORATION,  
RESPONDENT.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED APRIL 9, 1970  
CERTIORARI GRANTED JUNE 29, 1970**





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## **Relevant Docket Entries**

### **PART I**

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Defendant's Answer to Amended Complaint filed 14 April  
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Plaintiffs' Interrogatories Numbered 1 through 39 filed  
18 January 1967.

Defendant's Answers to Interrogatories Numbered 1  
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Order of the Court maintaining action as a class action  
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Defendant's Motion to Dismiss as a Class Action filed  
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Memorandum Opinion of the Court filed 30 September 1968.

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PART II

Plaintiffs' Exhibits Numbered 1 through 34 with the exception of exhibit number 11 which may be found in Part I of the Record on Appeal.

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**Complaint**

(Filed October 20, 1966)

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION  
CIVIL ACTION  
No. C-210-G-66

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WILLIE S. GRIGGS; JAMES S. TUCKER; HERMAN E. MARTIN;  
WILLIAM C. PURCELL; CLARENCE M. JACKSON; ROBERT A.  
JUMPER; LEWIS H. HAIRSTON, JR.; WILLIE R. BOYD;  
JUNIOR BLACKSTOCK; JOHN D. HATCHETT; CLARENCE C.  
PURCELL; EDDIE GALLOWAY; and EDDIE W. BROADNAX,  
*Plaintiffs,*

v.

DUKE POWER COMPANY, a corporation,  
*Defendant.*

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**I.**

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1343 (4) and 42 U. S. C. §2000e-5(f). This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000e et seq. Jurisdiction of this Court is invoked to secure the protection of and redress the deprivation of rights secured by 42 U. S. C. §§2000e et seq., providing for in-



*Complaint*

junctive and other relief against racial discrimination in employment.

## II.

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are employed by defendant Duke Power Company at its Draper, North Carolina plant, pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes of the class who are and have been limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs.

## III.

This is a proceeding for injunctive relief, restraining defendant from maintaining any policy, practice, custom or usage of: discriminating against plaintiffs and others of their class because of race with respect to compensations, terms, conditions and privileges of employment and limiting, segregating and classifying employees of defendant in ways which deprive plaintiffs and other Negro persons similarly situated of employment opportunities and otherwise adversely affect their status as employees because of race and color.

## IV.

Plaintiffs Willie S. Griggs, James S. Tucker, Herman E. Martin, William C. Purcell, Clarence M. Jackson, Robert

*Complaint*

A. Jumper, Lewis H. Hairston, Willie R. Boyd, Junior Blackstock, John D. Hatchett, Clarence C. Purcell, Eddie Galloway, and Eddie W. Broadnax are Negro citizens of the United States, residing in Rockingham County, North Carolina. Plaintiffs and the class they represent are presently employed by defendant.

## V.

Defendant Duke Power Company is a corporation incorporated and doing business pursuant to the laws of the State of North Carolina. The defendant operates and maintains plants and other facilities located in Draper and other cities of North Carolina. The defendant is an employer within the meaning of 42 U. S. C. §2000e-(b) in that the Company is engaged in an industry affecting commerce and employs more than 100 persons.

## VI.

Defendant has pursued and is presently pursuing a policy, practice, custom and usage of discriminating against and limiting the employment and promotional opportunities of plaintiffs and other Negro employees of defendant solely because of race or color.

A. Defendant has followed and is presently following a policy and practice of hiring and limiting its Negro employees to menial and low paying jobs and paying them less wages than white employees performing the same or similar work.

B. All Negro employees are limited primarily to the coal handling department and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by Company rules, to bid on job openings in

*Complaint*

or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen, are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications.

C. Defendant refuses its Negro employees the opportunity for overtime on the same basis as such opportunities are provided for white employees.

D. Defendant maintains separate facilities, including shower rooms, locker rooms, drinking fountains and other facilities for its Negro and white employees.

**VII.**

The defendant has instituted a test requirement which Negro employees must take and pass before they are considered for job vacancies or classified in positions heretofore limited to white employees. Plaintiffs believe and allege that the test is not professionally developed as required under 42 U. S. C. §2000e-2(h) and that the test, the administration and action upon the results are intended to discriminate against Negro employees because of race and color.

**VIII.**

The defendant's discriminatory policies and practices herein set forth were intended to and have and will have the effect of discriminating against plaintiffs and others of their class with respect to terms, wages, conditions, advantages, and opportunities of employment solely because of their race and color in violation of their rights

*Complaint*

to equal employment opportunities secured to them by Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000(e) et seq.

## IX.

Neither the State of North Carolina nor the County of Rockingham nor the City of Draper has a law prohibiting the unlawful practices alleged herein. On March 15, 1966, plaintiffs filed a complaint with the Equal Employment Opportunity Commission alleging violation by the defendant of plaintiffs' rights under Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000(e) et seq. On or about September 24, 1966, plaintiffs were advised that the Commission found reasonable cause to believe that violation of the Act had occurred and that the Commission had been unable to achieve voluntary compliance by defendant through conciliations as provided by the Act. Plaintiffs were further advised that they were entitled to initiate a civil action in the United States District Court as provided by 42 U. S. C. §2000e-5(f) of the Act.

## X.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for injunctive relief is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injuries from defendant's policies, practices, customs and usage as set forth herein unless and until enjoined by the Court.

WHEREFORE, plaintiffs respectfully pray the Court advance this cause on the docket, order a speedy hearing at

*Complaint*

the earliest practicable date, cause this matter to be in every way expedited and upon such hearing to:

(1) Grant plaintiffs and the class they represent, injunctive relief, enjoining the defendant, Duke Power Company, its agents, successors, employees, attorneys and those acting in concert and participation with them and at their direction, from continuing or maintaining any policy, practice, custom or usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiffs and others of their class to equal employment opportunities as secured by Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000e et seq.

(2) Grant plaintiffs and the class they represent injunctive relief enjoining the defendant, its agents, successors, employees, attorneys and those acting in concert and participation with them and at their direction, from maintaining, sanctioning and authorizing a policy or practice of hiring or limiting Negro employees to certain positions and job classifications and maintaining separate lines or job-progressions of advancement or otherwise limiting the rights of Negro employees to be advanced to other job classifications and positions or imposing conditions for such advancement upon Negro employees not required of white employees similarly situated, solely because of race or color.

(3) Grant plaintiffs and the class they represent injunctive relief enjoining the defendant, its agents, employees, successors, attorneys and those acting in concert and participation with them and at their direction from continuing or maintaining any policy, practice, custom or usage of paying Negroes less wages than white employees performing the same or similar work.

*Complaint*

(4) Grant plaintiffs and the class they represent injunctive relief enjoining the defendant, its agents, successors, employees, attorneys and those acting in concert and participation with them and at their direction from continuing or maintaining racially segregated employee facilities, including shower rooms, locker rooms, drinking fountains and other facilities.

(5) Allow plaintiffs their cost herein, including reasonable attorneys' fees and such other additional relief as may appear to the Court equitable and just.



**Defendant's Answer**

(Filed November 14, 1966)

[Caption Omitted]

Answering the allegations of the Complaint, the Defendant says:

1. The allegations of paragraph I are denied.
2. The allegations of paragraph II are denied.
3. Answering the allegations of paragraph III, the Defendant admits that this is a proceeding for injunctive relief. The remainder of the allegations of paragraph III are denied.
4. Answering the allegations of paragraph IV, it is admitted that the named Plaintiffs are citizens of the United States, that they reside in Rockingham County, and that they are employed by Defendant. The other allegations of paragraph IV are denied.
5. The allegations of paragraph V are admitted.
6. The allegations contained in paragraph VI and in each subsection thereof are denied.
7. The allegations of paragraph VII are denied. The Defendant alleges that any tests instituted at its Dan River Station are equally applicable to all employees similarly situated, regardless of race or color.
8. The allegations of paragraph VIII are denied.
9. Answering the allegations of paragraph IX, the Defendant admits that neither Rockingham County, the City

*Defendant's Answer*

of Draper, nor the State of North Carolina has a law prohibiting the unlawful employment practices herein alleged, but denies that it is engaged in such practices. As to the remainder of the allegations contained in paragraph IX, the Defendant alleges that they are improper because Section 706(a) of Title VII of the Civil Rights Act of 1964 provides that nothing said or done during and as a part of conciliation endeavors by the Equal Employment Opportunity Commission may be used as evidence in a subsequent proceeding.

10. The Defendant denies the allegations of paragraph X.

**FIRST DEFENSE**

The Complaint fails to state a claim against Defendant upon which relief can be granted.

**SECOND DEFENSE**

The employment and promotion policies and practices of the Defendant at its Dan River Steam Station which are in conformity with, and which were adopted in good faith and in reliance upon written interpretations of the office of the General Counsel of the Equal Employment Opportunity Commission, are and have been followed in good faith by the Defendant.

WHEREFORE, Defendant prays that the relief sought by Plaintiffs be denied; that this action be dismissed; and for such other and further relief as the Court may deem just and equitable.

**Plaintiffs' Motion for Leave to Amend Complaint**

(Filed April 7, 1967)

[Caption Omitted]

Come now the plaintiffs, by their undersigned counsel, and respectfully move the Court for leave to amend their complaint in the above-styled cause, and, as grounds therefor, show the following:

1. This cause was initially filed by plaintiffs on October 20, 1966, seeking injunctive and other relief against further racially discriminatory practices by defendant Duke Power Company, pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§2000e et seq. Plaintiffs seek relief by this action, for themselves, individually and for members of their class, presently employed or who might subsequently seek employment at defendant's Draper, North Carolina plant.

2. By its answer and subsequent pleadings, defendant has challenged the right of plaintiffs to proceed as a class.

3. To more clearly set forth the members of the class on behalf of whom plaintiffs seek to maintain this action, plaintiffs respectfully pray the Court for leave to amend paragraph II of their complaint as follows:

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are now employed or who may subsequently seek employment by defendant Duke Power Company at its Draper, North Carolina plant pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting

*Plaintiffs' Motion for Leave to Amend Complaint*

the rights of other Negroes of the class who are, have been and may be limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs.

WHEREFORE, plaintiffs pray the Court that leave be granted for them to amend their complaint as prayed herein.

**Order Allowing Amendment to Complaint**

(Filed April 12, 1967)

[Caption Omitted]

This cause coming on to be heard before the undersigned District Judge upon motion of plaintiffs for leave to amend their complaint and it appearing to the Court that there is good cause therefor;

IT IS, THEREFORE, Ordered, Adjudged and Decreed that the plaintiffs be and they are hereby allowed to amend paragraph II of their complaint as follows:

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are now employed or who may subsequently seek employment by defendant Duke Power Company at its Draper, North Carolina plant pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes of the class who are, have been and may be limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs.

It is further Ordered that the defendant shall file such answer or other response as it desires within twenty (20) days after service.

This 6th day of April, 1967.

/s/ EDWIN M. STANLEY  
*Judge, United States District Court*

**Answer to Amended Complaint**

(Filed April 14, 1967)

[Caption Omitted]

Upon motion of plaintiffs for leave to amend their complaint, the Court on April 12, 1967, entered an order allowing plaintiffs to amend paragraph II of their complaint as follows:

"Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated who are now employed or who may subsequently seek employment by defendant Duke Power Company at its Draper, North Carolina plant pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of other Negroes of the class who are, have been and may be limited, classified and discriminated against in ways which deprive and which tend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought and the interests of the class are adequately represented by plaintiffs."

Answering the allegations of paragraph II of the complaint as above amended, the defendant says:

"2. The allegations of paragraph II are denied."

WHEREFORE, the defendant prays that the relief sought by plaintiffs be denied; that this action be dismissed; and for such other and further relief as the Court may deem just and equitable.



**Plaintiffs' Motion for Leave to Amend Complaint**

(Filed June 13, 1967)

[Caption Omitted]

Come the plaintiffs, by their undersigned counsel, and respectfully move the Court for leave to amend their complaint to correctly set forth their job titles and positions at defendant's Dan River, Draper, North Carolina plant as follows:

Amending paragraph VI(B) to read as follows:

All Negro employees are limited primarily to the janitorial positions and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by company rules, to bid on job openings in or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen. with the exception of one Negro employee recently promoted to the coal-handling department are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications.

**Order Allowing Amendment to Complaint**

(Filed June 21, 1967)

[Caption Omitted]

This cause coming on to be heard before the undersigned upon motion by plaintiffs for leave to amend their complaint and it appearing to the Court that there is good cause to allow the amendment;

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the plaintiffs be and they are hereby allowed to amend paragraph VI(B) of their complaint so that the same will read:

All Negro employees are limited primarily to the janitorial positions and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by Company rules, to bid on job openings in or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen, with the exception of one Negro employee recently promoted to the coal-handling department, are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications.

/s/ EDWIN M. STANLEY  
*Chief Judge, United States District Court*

**Answer to Amended Complaint**

(Filed July 6, 1967)

[Caption Omitted]

Upon motion of Plaintiffs for leave to amend their complaint, the Court on June 21, 1967, entered an order allowing the Plaintiffs to amend paragraph VI (B) of their complaint as follows:

"All Negro employees are limited primarily to the janitorial positions and are classified as semi-skilled or common laborers. As such, they are not allowed or permitted, by Company rules, to bid on job openings in or to be advanced to other job classifications carrying better conditions, wages, terms and privileges of employment. All other jobs, held only by white employees of defendant, including that of watchmen, with the exception of one Negro employee recently promoted to the coal-handling department, are classified above the semi-skilled and common laborer titles and only white employees are eligible for job-progression in these classifications."

Answering the allegations of paragraph VI(B) of the complaint as above amended, the defendant says:

"6. It is admitted that thirteen Negroes employed at the Defendant's Dan River Steam Station are now classified as semi-skilled laborers and that one Negro is employed in the coal-handling section of the Defendant's Dan River Steam Station. As to the remainder of the allegations contained in this paragraph VI(B), they and each of them are denied."

WHEREFORE, the Defendant prays that the relief sought by plaintiffs be denied; that this action be dismissed; and for such other and further relief as the Court may deem just and equitable.

**Order Allowing Class Action**

(Filed June 19, 1967)

[Caption Omitted]

This matter was scheduled for conference with attorneys on May 26, 1967, to determine whether this action is maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure. After considering briefs and oral arguments of counsel and being fully advised in the premises, the Court was of the opinion that this action was maintainable as a class action and defined the class represented by plaintiffs;

**IT IS THEREFORE, ORDERED:**

(1) That this action is maintainable as a class action only insofar as it seeks injunctive relief from the alleged discriminatory practices existing at any time since the effective date of Title VII of the Civil Rights Act of 1964, and the class plaintiffs represent are those Negroes presently employed as well as those who may subsequently be employed by defendant at its Dan River Steam Station, Draper, North Carolina; and that plaintiffs also represent all Negroes who might hereafter *seek* employment at defendant's Dan River Steam Station, Draper, North Carolina, provided that plaintiffs can show that at least one Negro plaintiff of that class has sought and been denied employment or limited in any way in *seeking* employment solely because of his race or color since the effective date of Title VII of the Civil Rights Act of 1964;

(2) That this action is not maintainable under Rule 23(b)(3) and, therefore, it is unnecessary to provide for notice to members of the class represented by plaintiffs;

*Order Allowing Class Action*

(3) That this order does not establish any rule of relevancy or competency of evidence as to alleged discriminatory acts or practices which existed prior or subsequent to the effective date of Title VII of the Civil Rights Act of 1964, and the Court reserves judgment thereon until this cause comes on to be heard on the merits; and

(4) That, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, this order is conditional and may be altered or amended at any time prior to a decision on the merits.

/s/ EDWIN M. STANLEY  
*United States District Judge*  
6/19/67

**Motion to Dismiss as a Class Action**

(Filed May 15, 1968)

[Caption Omitted]

Defendant moves to dismiss this action as a class action on the following grounds:

- (1) The class is not so numerous that joinder of all members is impracticable; and
- (2) There are no questions of law or fact common to the class the plaintiffs seek to represent.



**Affidavit of A. C. Thies**

A. C. Thies, being duly sworn, deposes and says:

(1) I am Vice President, Production and Operation, of Duke Power Company and was such during all times herein mentioned. I have personal knowledge of the matters hereinafter referred to and make this affidavit in support of defendant's motion to dismiss this action as a class action.

(2) I am responsible for the personnel promotion policy at Dan River Station. Since the trial of this action was completed on February 9, 1968, the promotion and placements for training hereinafter set out have occurred at the Dan River Station.

(3) Jesse Martin is a Negro with a high school education and classified as a helper in coal handling operations. He is *not* one of the named plaintiffs. He was placed in training for utility operator on March 18, 1968, for promotion, if found qualified, to fill an anticipated vacancy. At the time Jesse Martin was placed in training for this position, there were in addition to Martin nine white employees in coal handling. Two of the white employees were high school graduates and, therefore, qualified for consideration. They declined to accept this transfer. Seven of the white employees were not high school graduates and all had been employed in coal handling at least ten years ago.

(4) On March 19, 1968, H. E. Martin, a Negro and one of the named plaintiffs having a high school education, began training for the position of watchman and was promoted from semi-skilled laborer to watchman effective April 1, 1968.

(5) R. A. Jumper is a Negro and one of the named plaintiffs. He has a high school education and is classified

*Affidavit of A. C. Thies*

as a watchman. On March 21, 1968, he began training to fill a test assistant's position. When he was unable to qualify for this position, he was moved to the shop on May 7, 1968, to train in mechanical work. At the time Jumper began this tour of training, there were in addition to Jumper two white employees classified as watchmen, both of whom had high school educations, and one white employee without a high school education who was employed more than ten years ago, i.e., prior to the adoption of the high school education requirement. Of those qualified, Jumper has the greatest length of service with the Company.

A. C. THIES

A. C. Thies

**Motion to Dismiss**  
**(Filed May 15, 1968)**

**[Caption Omitted]**

At the trial of this action, defendant made a Motion to Dismiss on the ground that plaintiffs failed to shoulder the burden of proving that the defendant intentionally engaged in discriminatory and, therefore, unlawful employment practices as alleged in the complaint. (R. p. 246)

Defendant herein renews its Motion to Dismiss on the ground that upon the facts and the law plaintiffs have shown no right to relief. In support thereof, defendant shows the following:

(A) The plaintiffs' own evidence establishes that Negro employees are not limited to menial and low-paying jobs, are eligible for progression and have progressed into job classifications above that of laborer. The plaintiffs' evidence further shows that no vacancies existed in classifications into which plaintiffs could be promoted from July 2, 1965, until August 8, 1966. On August 8, 1966, Jesse Martin, the senior Negro with a high school education, was promoted to learner in coal handling. Subsequently, R. A. Jumper, the next senior Negro with a high school education was promoted from laborer to watchman.

(B) The plaintiffs' own evidence establishes that Negro employees do not perform the same or similar work as white employees and receive less wages therefor.

(C) Some of the plaintiffs themselves admit they are not refused overtime opportunities and plaintiffs' own evidence shows that they are afforded opportunities for scheduled overtime and emergency overtime on an equal basis with white employees. In addition, the evidence (Answer to

*Motion to Dismiss*

Interrogatory 34(a) and (b)) shows nearly equal allocation of overtime among the departments.

(D) The plaintiffs' expert testified he did not know the meaning of the phrase "professionally developed ability tests" as used in the Act. The plaintiffs' evidence, therefore, fails to make even a prima facie showing that the tests are not "professionally developed ability tests" within the meaning of Section 703(h) of the Act.

(E) The plaintiffs' own evidence establishes that the tests are equally applicable to white and Negro employees similarly situated.

(F) Education is *not* one of the proscribed bases of discrimination under Title VII of the Act. The plaintiffs' own evidence establishes that the high school education requirement is equally applicable to all employees similarly situated. The nondiscriminatory requirement is being applied in a nondiscriminatory manner.

(G) Title VII of the Civil Rights Act of 1964 has prospective effect. Plaintiffs have failed to show a single instance wherein a Negro with a high school education was denied a promotion into higher skilled classifications since July 2, 1965.

**Memorandum Opinion**  
(Filed September 30, 1968)

[Caption Omitted]

GORDON, District Judge

Duke Power Company, the defendant in this action, is a corporation engaged in the generation, transmission, and distribution of electric power to the general public in North Carolina and South Carolina. The thirteen named plaintiffs are all Negroes and contend that the defendant has engaged in employment practices prohibited by Title VII of the 1964 Civil Rights Act, 20 U.S.C. § 2000 at its Dan River Station located in Draper, North Carolina (recently consolidated with the Towns of Leaksville and Spray and named Eden) and ask that such discriminatory practices be enjoined.

An order was entered on June 19, 1967, allowing the action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. The class was defined as those Negroes presently employed, and who subsequently may be employed, at the Dan River Steam Station and all Negroes who may hereafter seek employment at the Station. The Court has found no reason to alter the June 19 Order.

The evidence in this case establishes that due to the requirements for initial employment, Negroes who may subsequently be employed by defendant would not be subject to the restrictions on promotions which the named plaintiffs contend are violative of the Act. A high school education and satisfactory test scores are required for initial employment in all departments except labor. Plaintiffs certainly cannot contend that employees without those requisites who are hired for the labor department subsequent to the implementation of the requisites should be allowed to transfer

*Memorandum Opinion*

into other departments when they could not have been initially employed in those departments. This would be to deny the defendant the right to establish different standards for different types of employment. Further, the plaintiffs do not contend that the defendant's requirements for initial employment are discriminatory. Only fourteen Negroes are presently employed by the defendant, thirteen of whom are named plaintiffs.

The work force at Dan River is divided for operational purposes into the following departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The jobs of watchman, clerk, and storekeeper are in a miscellaneous category.

Within each department specialized job classifications exist.<sup>1</sup> These classifications constitute a line of progression

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<sup>1</sup> Answer to Interrogatory No. 11:

POWER STATION OPERATORS	LABOR
Control Operator	Labor Foreman
Pump Operator	Auxiliary Serviceman
Utility Operator	Laborer (Semi-Skilled)
Learner	Laborer (Common)
COAL AND MATERIAL HANDLING	MISCELLANEOUS
Coal Handling Foreman	Watchman
Coal Equipment Operator	Clerk
Coal Handling Operator	Chief Clerk
Helper	Storekeeper
Learner	
MAINTENANCE	SUPERVISORS
Machinist	Superintendent
Electrician-Welder	Assistant Superintendent
Mechanic A	Plant Engineer
Mechanic B	Assistant Plant Engineer
Repairman	Chemist
Learner	Test Supervisor
TEST AND LABORATORY	Maintenance Supervisor
Testman-Labman	Assistant Maintenance
Lab and Test Technician	Supervisor
Lab and Test Assistant	Shift Supervisor
	Junior Engineer

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for purposes of employee advancement. The term "line of progression" is then synonymous with "department."

Approximately ten years ago,<sup>2</sup> the defendant initiated a policy making a high school education or its equivalent a prerequisite for employment in all departments except the labor department. The effect of the policy was that no new employees would be hired without a high school education (except in the labor department) and no old employees without a high school education could transfer to a department other than the labor department. The high school requirement was made applicable on a departmental level only, and was not made the basis for firing or demoting a person employed prior to its implementation.

In July of 1965 the defendant instituted a new policy for initial employment at the Dan River Station. A satisfactory score on the Revised Beta Test was the only requirement for initial employment in the labor department. In all other departments and classifications, applicants were required to have a high school education *and* make satisfactory scores on two tests, the E. F. Wonderlick Personnel Test and the Bennett Mechanical Comprehension Test, Form AA. The company's promotional policy was unchanged and a high school education remained the only prerequisite to a departmental transfer.

In September, 1965, at the instigation of employees in the coal-handling department, the defendant promulgated a policy by which employees in the coal-handling and labor departments and the watchman classification without a high school education could become eligible for considera-

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<sup>2</sup> At the trial of this case, objections by defendant to evidence of activities prior to July 2, 1965, were sustained and the evidence recorded. Upon a study of briefs subsequently submitted by the parties, the Court has for purposes of this case only, considered the evidence as competent and relevant.

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tion for transfer to another department by attaining a satisfactory score on the two tests previously mentioned. This procedure was made available only to persons employed prior to September 1, 1965.

*Applicable Provisions of the Act*

Sections 703(a)(1) and (2) of Title VII of the 1964 Civil Rights Act provide:

"Section 703(a), 42 U.S.C. § 2000e-2(a):

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The mandates of those two sections is qualified by the following sections of the Act:

"Section 703(h), 42 U.S.C. § 2000e-2(h):

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation,



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or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

"Section 703(j), 42 U.S.C. § 2000e-2(j):

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by an employment agency or labor or-

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ganization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Congress intended the Act to be given prospective application only. Any discriminatory employment practices occurring before the effective date of the Act, July 2, 1965, are not remedial under the Act.<sup>3</sup>

The plaintiffs first contend that they are restricted to the menial and low-paying jobs and are effectively denied an equal opportunity to advance to the more remunerative positions because of their race.

The evidence shows that there are approximately 95 employees at the Dan River Station, 14 of whom are Negroes. As of July 2, 1965, the 14 Negroes held jobs in the labor department which has a lower pay scale than any other department. On August 8, 1966, three months prior to the institution of this suit, Jesse Martin, the senior Negro laborer with a high school education was promoted to learner in the coal handling department. The 13 Negroes remaining in the labor department are the plaintiffs in this action. One of those, R. A. Jumper, the next senior Negro laborer with a high school education has since been promoted to the watchman position. Only one other Negro has a high school education. Actually, the high school and test-

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<sup>3</sup> Actually, the evidence places the number of defendant's employees between 90 and 95. The Act was not made applicable to employers with under 100 employees until July 2, 1966.

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ing requirements which plaintiffs allege are violative of the Act affect only those plaintiffs without a high school education.

The evidence shows that only three of the nine white employees in the coal handling department have a high school education; only eight of the seventeen white employees in the maintenance department have a high school education; two white shift supervisors in the power plant have less than a high school education; the two coal handling foremen have less than a high school education; and the labor foreman has less than a high school education.

Although company officials testified that there has never been a company policy of hiring only Negroes in the labor department and only whites in the other departments, the evidence is sufficient to conclude that at some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race.

The plaintiffs contend that upon their initial employment they were placed in the low paying labor department and were denied access to the more desirable departments as a result of the defendant's discriminatory hiring and promotional policies. Since the discrimination occurred prior to July 2, 1965, it is not remedial under the 1964 Civil Rights Act. But the plaintiffs reason that in subsequently applying the high school education requirements on a departmental basis only, the initial discrimination was carried over and continues to the present. This result, they say, is demonstrated by the fact that white employees without a high school education are eligible for job openings in the more lucrative departments while Negro employees with the same or similar educational qualifications are restricted to job classifications in the lower paying labor department.

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Under plaintiffs' theory, the departmental structure of defendant's work force is tainted by prior discriminatory practices and therefore cannot serve as a basis for applying educational or general intelligence standards as prerequisites to promotion. Plaintiffs contend that the present system continues the past discrimination and violates the Act.

The plaintiffs do not contend nor will the evidence support a finding that the division of defendant's work force into departments is an unreasonable system of classification. To the contrary, the evidence shows that jobs within each department require skills which differ in degree and kind from the skills required in the performance of jobs in other departments. Also, each department has a different function in the total operation of the plant.

The plaintiffs do not contend that discrimination on the basis of education is proscribed by the Act. But they do contend that a high school education requirement which of itself continues the inequities of prior racial discrimination is prohibited.

This theory brings into issue how Congress intended the Act to be applied.

The legislative history of the Act is replete with evidence of Congress' intention that the Act be applied prospectively and not retroactively. Clark-Case Memorandum, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 329; Justice Dept. Reply on Title VII, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 326.

In providing for prospective application only, Congress faced the cold hard fact of past discrimination and the resulting inequities. Congress also realized the practical impossibility of eradicating all the consequences of past dis-

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crimination. The 1964 Act has as its purpose the abolition of the policies of discrimination which produced the inequities.

It is obvious that where discrimination existed in the past, the effects of it will be carried over into the present. But it is also clear that policies of discrimination which existed in the past cannot be continued into the present under the 1964 Act. Plaintiffs do labor under the inequities resulting from the past discriminatory promotional policies of the defendant, but the defendant discontinued those discriminatory practices. More than ten years ago it put into effect a high school education requirement intended to eventually upgrade the quality of its entire work force. At least since July 2, 1965, the requirement has been fairly and equally administered.

The requirement was made applicable to a departmentalized work force without any intention or design to discriminate against Negro employees. The departments serve as a reasonable system of classification with each department having a different function and each department requiring different skills. It is important to remember that the departmental structure does not result in Negroes doing the same or similar work as white employees but receiving smaller wages. The past discrimination was in restricting Negroes to the menial and low paying jobs in the labor department. Had Negroes not been restricted in this fashion prior to the institution of the high school education requirement, there would be no question of the present legality of defendant's policies.

If the relief requested by plaintiffs is granted, the defendant will be denied the right to improve the general quality of its work force or in the alternative will be required to abandon its departmental system of classification

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and freeze every employee without a high school education in his present job without hope of advancement. And these harsh results would be necessary, under plaintiffs' theory, because of discriminatory practices abandoned by the defendant over ten years ago.

It is improbable that any system of classification used by an employer who has discriminated prior to the effective date of the Act could escape condemnation if this theory prevailed, regardless of how fair and equal its present policies may be. This Court does not believe such application of the Act to have been contemplated by Congress. Otherwise, it would have been unnecessary to indicate an intention that the Act receive only prospective application.

The plaintiffs cite *Quarels v. Phillip Morris, Inc.*, an unreported decision in the Eastern District of Virginia. That case held that restrictions on departmental transfers where the departments had been organized on a racially segregated basis were violative of the Act. Interdepartmental transfers had been completely prohibited under the prior discriminatory practices. Provisions of two collective bargaining agreements negotiated in the fall of 1964 and effective over a three-year period from February 1, 1965, modified the previous no-transfer policy only to the extent that a limited number of employees from the previously all-Negro departments would be allowed to transfer to the previously all-white department. A "Memorandum of Understanding" executed on March 7, 1966, modified seniority and transfer provisions only in degree. These provisions, in effect, continued the old discriminatory no-transfer policies except that four Negroes were allowed to transfer every six months without effect on their seniority rights. These present practices retained the discriminatory flavor of the past and were held violative of the Act.

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The restrictions on departmental transfers at Duke Power's Dan River Station are distinguishable from the restrictions of Phillip Morris, Inc., condemned in *Quarles*. The restrictions on interdepartmental transfers at Duke Power are based on education requirements whereas the policy at Phillip Morris represented only a relaxation of earlier restrictions based on race. Phillip Morris exhibited no business purpose or reason for its transfer restrictions, but as pointed out heretofore, Duke Power had legitimate reasons for its educational and intelligence standards and for applying those standards to its departmental structure.

If the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise. The text of the legislation redounds with the term "unlawful employment practice." There is no reference in the Act to "present consequences." Moreover, under no definition of the words therein can the terms "present consequences of past discrimination" and "unlawful employment practice" be given synonymous meanings.

This does not mean that a court cannot look beyond the effective date of the Act to determine whether present practices are discriminatory. That, in fact, was what the court did in the *Quarles* case.

Plaintiffs secondly contend that the defendant's policy of allowing passing marks on two general intelligence tests to substitute for a high school education in determining eligibility for departmental transfer is discriminatory and in violation of the Act.

The application of defendant's testing procedures on a departmental basis is not in violation of the Act for the same reasons expressed previously in the discussion of the high school requirement.



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In light of this Court's holding that the defendant's policy of making a high school education a prerequisite to departmental transfers is non-discriminatory, it would appear to be in derogation of the plaintiffs' interests to abolish the use of test scores as a substitute for the high school requirement. But to the extent that the nature of the tests may be discriminatory, their validity under the Act must be examined.

Section 703(h), (42 U.S.C. § 2000-2(h)) of the Act provides that it shall not be

"[A]n unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The clause was inserted by an amendment introduced by Sen. Tower (R. Tex.). It was designed to insure the employer's right to utilize ability tests in hiring and promoting employees which practice had been condemned by a hearing examiner for the Illinois Fair Employment Practices Commission.

The plaintiffs apparently read the section to allow tests only when they are developed to predict a person's ability to perform a *particular* job or group of jobs. That is, if the job requires only manual dexterity, then the Act requires an employer to utilize only a test that measures manual dexterity. Guidelines on employment testing procedures set out by the Equal Employment Opportunity Commission serve to fortify that appraisal of the Act:

"The Commission accordingly interprets 'professionally developed ability test' to mean a test which



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fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs."

This Court cannot agree to this interpretation of § 703(h). Title VII of the 1964 Act has as its purpose the elimination of discriminatory employment practices. It precludes the use of ability tests which may be used to discriminate on the basis of race, color, religion, sex, or national origin. Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs. Nowhere does the Act require the use of only one type of test to the exclusion of other non-discriminatory tests. A test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma. In fact, a general intelligence test is probably more accurate and uniform in application than is the high school education requirement.

The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race, color, religion, sex, or national origin. The evidence establishes that the tests were professionally developed to perform this function and therefore are in compliance with the Act.

The Act does not deny an employer the right to determine the qualities, skills, and abilities required of his

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employees. But the Act does restrict the employer to the use of tests which are professionally developed to indicate the existence of the desired qualities and which do not discriminate on the basis of race, color, religion, sex, or national origin.

The defendant's expert testified that the Wonderlic Test was professionally developed to measure general intelligence, i.e., one's ability to understand, to think, to use good judgment. The Bennett Test was developed to measure mechanical understanding of the operation of simple machines. These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees. The Act does not deprive him of the right to use a test which accurately, reliably, and validly measures the existence of those qualities in an applicant for initial employment or for promotion.

Plaintiffs lastly contend that the defendant discriminates on the basis of race in the allocation of overtime work at its Dan River Station.

Overtime work at Dan River is referred to as "scheduled overtime" or "emergency overtime." Every employee at the station is allotted eight hours of "scheduled overtime" every four weeks. All other overtime is "emergency overtime."

Between July 2, 1965, and February, 1967, employees in the coal-handling department worked approximately 10.39 per cent of their total working hours in overtime. The percentage of overtime worked by employees in other departments was as follows: maintenance, 7.84 per cent; operations, 5.39 per cent; labor, 5.22 per cent; and other, 5.19 per cent. The high percentage of overtime worked by employees in coal handling was due to erratic deliveries of

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coal and the difficulty in handling frozen coal during winter months. As a general rule, overtime work is done by the employees of the department which would ordinarily do the work. But occasionally in coal handling, the work load becomes so great that employees from other departments are called in to help. The gist of plaintiffs' contention is that Negroes are denied overtime work in coal-handling and so are discriminated against in the allocation of overtime. The evidence does not support this contention.

The percentages of overtime worked in each department, with the exception of coal-handling, are very similar. The higher percentage in the maintenance department appears to have been due to overtime work in repairing equipment and not to overtime in the coal-handling operations. Further, the evidence is that Negroes in the labor department assigned to work in coal-handling do not work the same overtime as employees in the coal-handling department because of the danger involved in doing their work at night while the coal-handling operations are going on.

It is concluded that the difference between allocation of overtime to employees is not the result of discriminatory practices and is not in violation of the Act.

*Conclusions of Law*

1. This Court has jurisdiction over the parties and subject matter of this action, pursuant to the provisions of Section 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. By order of this Court dated June 19, 1967, this action was permitted to be maintained as a class action, but the order was made conditional in nature pursuant to the Federal Rules of Civil Procedure 23(c)(1). The order de-

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fined the class plaintiffs sought to represent as all Negroes presently employed, all Negroes who may subsequently be employed, and all Negroes who may hereafter seek employment at the defendant's Dan River Steam Station in Draper, North Carolina.

3. The Court is of the opinion, finds, and concludes that the defendant's high school education requirement does not violate Title VII of the Act. It has a legitimate business purpose and is equally applicable to both Negro and white employees similarly situated.

4. The tests in use by the defendant at its Dan River Station are professionally developed ability tests within the meaning of Section 703(h) of the Act and are not administered, scored, designed, intended, or used to discriminate because of race or color.

5. Title VII of the Civil Rights Act of 1964 became effective July 2, 1965. The legislative history of the Act clearly shows that it is prospective and not retroactive in effect. Since the effective date of the Act, the defendant has not limited, classified, segregated, or discriminated against its employees in any way which has deprived or tended to deprive them of any employment opportunities because of race or color.

6. The defendant has not discriminated in the allocation of overtime on the basis of race or color and is not in violation of the Act.

7. The plaintiffs have failed to carry the burden of proving that the defendant has intentionally discriminated against them on the basis of race or color. There are no

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legally established facts from which the Court could draw an inference that the defendant has so discriminated.

Accordingly, no relief is appropriate, and a judgment dismissing the complaint will be entered. Within ten (10) days of this date, counsel for the defendant will submit a proposed judgment, first submitting same to counsel for the plaintiffs for approval as to form.

/s/ EUGENE A. GORDON

*United States District Judge*

September 30, 1968

**Judgment**

(Filed October 9, 1968)

[Caption Omitted]

This action came on for trial on February 6, 1968, and February 9, 1968, before the Honorable Eugene Gordon, United States Judge, without a jury, and the evidence adduced by the parties having been heard and the Court having made its findings of fact and conclusions of law as set forth in the Court's Memorandum Opinion dated September 30, 1968, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiffs, and the class they represent, are not entitled to relief in this action; that their complaint and this action is hereby dismissed on the merits; and that the defendant recover its costs.

/s/ EUGENE A. GORDON  
*United States Judge*

**Notice of Appeal**

(Filed October 18, 1968)

[Caption Omitted]

**NOTICE OF APPEAL AND DESIGNATION OF RECORD ON APPEAL**

**I**

Notice is hereby given that Willie S. Griggs, et al., plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the final judgment and order entered in this action on the 9th of October, 1968 by the United States District Court for the Middle District of North Carolina, Greensboro Division, pursuant to the Memorandum Opinion of said Court on September 30, 1968.

**II**

**DESIGNATION OF RECORD ON APPEAL**

Plaintiffs, by their undersigned attorney, pursuant to Rule 10 of the Federal Rules of Appellate Procedure for the United States Court of Appeals, hereby designate all the original files and the complete transcript of the evidence in the subject case for inclusion in the record on appeal, including all pleadings, exhibits, affidavits, testimony, orders, memorandum opinion, judgment, notice of appeal and this designation.

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*Attorney for Plaintiffs*

**Transcript of Hearing February 6, 9, 1968**

Pursuant to notice, the above entitled case was heard in the United States Courtroom, Federal Building, Greensboro, North Carolina, commencing at 9:30 a.m. on the 6th day of February, 1968.

HONORABLE EUGENE A. GORDON, *Presiding*

**APPEARANCES***For the Plaintiffs:*

J. LEVONNE CHAMBERS, Esq.

DAVID DANSBY, Esq.

ROBERT BELTON, Esq.

*For the Defendant:*

GEORGE W. FERGUSON, Esq.

WILLIAM I. WARD, JR., Esq.

GRAHAM ERLACHER, *Official Court Reporter*

**[8] . . .**

Mr. Belton: First, we'd like to introduce and have marked for identification, Plaintiffs' Exhibit #1, which is the charge filed with the Equal Employment Opportunity Commission. I show Counsel for the Defendants a copy of the charge, and ask if he will be willing to stipulate that, that similar charges were filed by each of the named Plaintiffs in the Case?

Mr. Ferguson: No, sir. May it please the Court? On the 26th day of April, 1966, Mr. J. D. Knight, Superintendent of the Dan River Steam Station, is receipted for service of certain charges from the Equal Employment Opportunity Commission, made by the Plaintiffs in this Case. Upon examination of what Mr. Belton furnishes me and upon



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examination of the charges for which we receipted service, I find a substantial difference, and moreover, we object to anything introduced into this proceeding in connection with the Equal [9] Opportunity Commission, relying on—in Section 706A of the Statute, which says that “nothing said or done during and as a part of such endeavor, referring to the Conciliation Persuasion, and so forth, may be made public by the Commission without the written consent of the Parties or used as evidence in a subsequent proceeding.”

Mr. Belton: At this time, Your Honor, we'd like to introduce into evidence copies which the Plaintiffs—a copy of each of the charges filed with the Equal Employment Opportunity Commission. These are the charges that the Plaintiff filed and the ones that were given to us by the Plaintiffs.

The Court: But you say they were different from what you received?

Mr. Ferguson: Yes, sir.

The Court: I don't see why you couldn't resolve that difference between you. You know,—it was a written document, wasn't it?

Mr. Ferguson: Yes, sir.

The Court: How on earth could there be a difference in that? I don't understand.

Mr. Ferguson: Your Honor, it's in different type. The charges are different. They both allege discrimination, but regardless of the difference in the two [10] documents, we would moreover object on the ground that it is not admissible.

The Court: Get me—that's 42USCA2000.

Mr. Ferguson: Yes, sir.

Mr. Belton: May it please the Court on the point of whether the documents sought to be introduced, are admis-

*Colloquy*

sible, Counsel for the Defendant points to a Section pertaining to the confidentiality Section of the Statute. Plaintiffs contend that the correct reading of the Statute means that nothing shall be introduced into evidence that was talked about or discussed in the course of Conciliation, which means that Conciliation takes place after a charge has been filed,—after an investigation has been made, and after the Commission has rendered a decision, and we think a proper reading of the language in 706 shows that the documents sought to be introduced by the Plaintiff, do not come within the ambit of the purview of the confidentiality of the provision of that section.

The Court: Let me take a look at it. Of course, you've got to, before you have a right to bring this action, you have to show that you have filed with the Commission something. That's a condition preceding to this, isn't it?

Mr. Ferguson: That's quite true, Your Honor, but [11] we did not question jurisdiction of this matter.

Mr. Belton: The reason why we are seeking to introduce this, Your Honor, is because it does go to the question of one of the—for the prayer of relief on the complaints, to show that each of the main Plaintiffs have pursued their remedies for the—you see, since this is part of the Class action—

The Court: What do you say about this discrepancy about what they receipted for? What is your surmise of the difference there?

Mr. Belton: The only thing that I can surmise, Your Honor,—it would be just a—I guess, on my part is that what may have happened is that after the charge had been properly noted or after the copies which I have, had been received by the Commission, the Commission may have attempted to try to get the Parties to further explain the

*Colloquy*

basis of their charge and may have taken statements for them, in the course of their investigation. This is my surmise, Your Honor.

The Court: You might disagree with this. Just in what respects—have you seen what Mr. Ferguson has by way of what he says was filed with them? Were they receipted for? What I want to know, what is the essential difference? Maybe you can tell me, Mr. Ferguson.

[12] Mr. Ferguson: Your Honor, in this particular document, the one for which we gave a receipt, they talk about discrimination based on tests—that it was necessary to take a test to qualify for any job level different than the one they are working in. That's all it says, except a general broad allegation of discrimination.

The Court: Wasn't that in the one they filed?

Mr. Ferguson: No, sir. They had made a broad allegation to the same effect, partially, except that in the one that they now show me, it talks about maintenance of separate facilities and discrimination in rates and scales of pay. Nothing about tests at all, although their complaint alleges discrimination based on tests.

The Court: Let me read this, for just a moment. Well, I'm going to overrule the objection and let the record show that the Defendant objects to the introduction into the evidence of copies of the charges which Plaintiffs allege that they filed with the EEOC on March 15th.

Mr. Ferguson: Your Honor, it please the Court, mine says March the 15th, and this one says the 10th of August of '66. I don't know what's happened here. I raised this at the Pre-Trial Conference or prior to [13] the Pre-Trial Conference, when we were getting this Order together and for that reason, reserve my right to object to it at this time, and I pointed this out to them.

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The Court: Well, I do not understand. I will allow you, if you desire, to introduce what you have there.

Mr. Ferguson: No, sir.

The Court: This is a non-jury matter.

Mr. Ferguson: Yes, sir.

The Court: The rules of evidence are, in my opinion, just as strict as they would be if it were a jury matter. However, the Courts have been rather liberal to us in assuming that when we start writing our decision about it, that we only consider that which is competent, and dismiss from our minds when we look at that which is not competent. So, having that rule in mind, I am a little more liberal with getting whatever is done and said about the matter. If I haven't so protected the Defendant, let it show that they object and except to the introduction of the copies into the evidence in this case.

(Plaintiffs' Exhibit #1 was received into evidence.)

Mr. Belton: At this time, I'd like to have marked [14] for identification Plaintiff's Exhibit #1, which is the charge of Clarence Jackson; Plaintiffs' Exhibit #2, which is the charge of James Tucker; Plaintiffs' Exhibit #3, which is the charge of Jumper and Hairston, each—H-a-i-r-s-t-o-n; Plaintiffs' Exhibit #4 is the charge of Clarence Purcell and Willie Griggs; Plaintiffs' Exhibit #5, which is charge of Hatchett—H-a-t-c-h-e-t-t; Plaintiffs' Exhibit #6, which is the charge of Herman Martin; Plaintiffs' Exhibit #7, which is the charge of Eddie Galloway and Junior Blackstock; and Plaintiffs' Exhibit #8, which is the charge of William C. Purcell—P-u-r-c-e-l-l—William Purcell.

The Court: What was that last number, Mr. Vaughn?

*Colloquy*

Clerk Vaughn: #8.

(Plaintiffs' Exhibit #1, #2, #3, #4, #5, #6, #7, and #8 were marked for identification.)

Mr. Belton: At this time, Plaintiffs would also like to introduce into evidence the decision of the EEOC, which accompanied the letter advising the named Plaintiffs of their right to proceed in Court.

The Court: Any objection by the Defendant?

Mr. Ferguson: Same objection, Your Honor.

The Court: All right. Let the record show that the objection is overruled and that the Defendant excepts to this ruling of the Court.

**[16]** \* \* \*

Mr. Belton: We would like to introduce at this time, Plaintiffs' Exhibit #10, which is a copy of the letter sent to each Plaintiff advising them of their right to proceed in Court. At this time, I would like to ask if I could get a stipulation from Counsel that each of the named Plaintiffs received a copy of the letter, so that I won't have to introduce all of them?

Mr. Ferguson: As far as I am concerned, you may introduce that as representative of what was received by all the Plaintiffs.

The Court: All right.

(Plaintiffs' Exhibit #10 was marked for identification.)

Mr. Belton: We introduce a letter of Willie Boyd, as exemplifying the letter received by each of the named Plaintiffs. We'd also like to introduce at this time, Plaintiffs' Exhibit, and have marked for identification Plaintiffs' Exhibit

*Colloquy*

#11, which consists of answers to interrogatories, which were the interrogatories propounded to them. These were the answers [17] supplied in February of '67 and March of '67. I would like to ask the Court, since there is a copy of the interrogatories on file, if we might have the originals marked for an Exhibit, for the record?

The Court: You say, February and March of '67?

Mr. Belton: That's correct, Your Honor.

The Court: Yes, that will be all right.

. . . . .

[21] . . . .

Mr. Belton: We would like at this time to have marked for identification and introduced into evidence, the Wonderlic—a copy of the Wonderlic Personnel Manual.

. . . . .

[22] . . . .

The Court: All right, let the record show that the Exhibit #13 is received into the evidence.

(Plaintiffs' Exhibit #13 was marked for identification, and received into evidence.)

Mr. Belton: We'd like to introduce at this time and have marked for identification, the depositions in their entirety, of Kenneth Austin, who is the Vice-President of Personnel for the Company.

. . . . .

[26] (Plaintiffs' Exhibit #14 was marked for identification.)

Mr. Belton: We would like to have marked for identification at this time and introduce into evidence the depositions of Mr. J. D. Knight, who is the Superintendent in

*Colloquy*

charge of the Dan River Steam Station, a facility of the Company.

The Court: All right.

(Plaintiffs' Exhibit #15 was marked for identification.)

How about letting Mr. Belton go ahead with these depositions, and then you can, Mr. Ferguson, make whatever objections you want to make.

Mr. Ferguson: All right.

Mr. Belton: We'd like to have marked for identification and introduced at this time the deposition of Mr. Theis, who is a Vice-President of Production Operation of the Company.

(Plaintiffs' Exhibit #16 was marked for identification.)

Mr. Belton: We'd like to have marked for identification and introduced into evidence the depositions in their entirety of Mr. J. Dan Rhyne, who is the assistant to Mr. Knight at the Dan River Steam Station.

(Plaintiffs Exhibit #17 was marked for identification.)

[27] . . .

Mr. Belton: We'd like to have marked for identification as Exhibit #18 and introduced into evidence, the deposition in the entirety of Mr. Richard K. Lemons, . . .

. . . . .

[31] . . .

Mr. Belton: Those, Your Honor, are the depositions.

The Court: All right, Mr. Ferguson. On the depositions, starting with Exhibit #14, what objection if any, do you have to Exhibits #14 through #30?

*Colloquy*

Mr. Ferguson: Your Honor, we would have the same levity objection that we had to Mr. Kenneth Austin's [32] deposition, that I mentioned to you previously. I don't think there's any necessity in repeating it. We would—after we got a chance to look at the composite picture and other evidence to overcome what we think are inferences that are not properly drawn.

The Court: All right. To protect you on the record, let's state that you object to the introduction of Exhibits #14 through #30, and the objection is overruled, and Exhibits #14 through #30 are received into the evidence. Let the record show that actually, the Defendant only contends as to the deposition—that it should be allowed to amplify and explain some of the answers made in these depositions, and if so allowed, really indicates no objection to the deposition.

The Court had advised the Defendant that it would be given opportunity to give such additional explanation of the answers contained in these depositions as the rules of evidence allow. All right.

(Plaintiffs' Exhibits #14 through #30 were received into evidence.)

Mr. Belton: May it please the Court? We would like to have marked for identification and introduce into evidence at this time, Plaintiffs' Exhibit #31, which is the educational background of all employees of the Company as of April 29, 1966.

[33] The Court: Now, is that contained on just one sheet?

Mr. Belton: It consists of two sheets, Your Honor.

The Court: All right.

Mr. Ferguson: I am inquiring of Counsel if he represents that this is what I furnished him with my letter of September 15, 1967?



*A. C. Thies—for Defendant—Direct*

Mr. Belton: That's correct.

The Court: All right, let the record show that received into the evidence is Plaintiffs' Exhibit #31.

(Plaintiffs' Exhibit #31 was marked for identification and received as evidence.)

• • • • •

[43] • • •

Mr. Ferguson: Come around, Mr. Thies.

Whereupon, A. C. Thies was duly sworn and testified as follows:

Mr. Belton: Your Honor, before we get to the testimony of this witness, I would like to ask the Court to clarify for purposes of the record whether or not the Exhibits have to be introduced—Exhibits 5 through 12, if you will?—sought to be introduced? If you will receive in evidence, for clarification of the record?

The Court: Let the record show that the Exhibits offered by the Plaintiffs, being Exhibits #1 through #32, were received into evidence of the Court, subject to the objections made by the Defendant, which appear already on record. That takes them all, in case you've overlooked any.

(Plaintiffs Exhibits #5 through #13 were received into the evidence.)

Mr. Belton: Thank you.

[44] The Court: All right.

*Direct Examination by Mr. Ferguson:*

Q. For the record, please state your name. A. Austin C. Thies.

*A. C. Thies—for Defendant—Direct*

Q. Mr. Thies, what's your occupation? A. I'm Vice-President of Production and Operation for the Duke Power Company.

Q. What is your educational background, Mr. Thies? A. I have a BS Degree in Mechanical Engineering from Georgia Institute of Technology.

Q. Are you responsible for the operations at the Dan River Steam Station, subject to this proceeding? A. Yes, I am.

Q. Would you describe, please, sir, in a general way the operations that are conducted at the Dan River Station?

A. At Dan River, we are in the process of converting the energy in coal into electrical energy for our customers, and in order to do this, we receive large quantities of coal from the mines. We weigh it; we sample it; we unload it; we distribute it to storage of the bunkers. It is fed from these bunkers through pulverizing mills into the boilers. From the boilers, the energy that's in the coal is turned into heat energy by burning, and this heat energy forms steam, and that steam is brought to the turbine generators [45] where the heat energy and the steam is turned into mechanical energy of the rotation of the machinery, and the rotational energy and the mechanical energy and the turbine drives of the generator, where that is changed into electrical energy, and then that electrical energy is taken out to the sub-station to step up the voltage for transmission over the power system. Now, this is an overall concept of the operations at Dan River.

Q. Thank you. Are the operations at Dan River divided departmentally? A. Yes, sir, they are.

Q. Would you name the departments, please, sir, and the functions of each? A. Well, I suppose we can follow the same general pattern that I followed in describing the

*A. C. Thies—for Defendant—Direct*

functions of the station. The coal is received by the Coal Handling Operations group, or Department, and these individuals are responsible for the weighing, the sampling, the unloading, the transporting of the coal, the operation of locomotors, the bulldozers, the crushers, the equipment in the coal handling operations, and this is that department's function. The Operating Department takes over next. They are responsible for safe and efficient and reliable operation of the equipment within the Power Station, and the equipment comes under their control. They operate the boilers, the turbines [46] and all of the auxiliaries and control equipment. They operate the electrical sub-station,—the inner connections with the other Power Companies, and the system. The Maintenance Department is in the Power Station, and it is responsible for all mechanical and electrical maintenance, and such things as welding and that sort of work. It's mechanical maintenance of all of the equipment—electrical maintenance of all of the equipment.

The Court: What exactly did you say—the first one you talked about—the handling of the coal? The second one was the Operating Department, and the third, Maintenance Department, and you said the first was concerned with the coal. What did you call that division?

The Witness: That is the Coal Handling Department—coal handling operation.

The Court: All right. All right.

The Witness: Then, we have, these are the three major divisions, I suppose, of the departments, of the organization. We have certain service departments. We have a Laboratory Department where

*A. C. Thies—for Defendant—Direct*

laboratory technicians are responsible for the analysis of boiler water to keep the boiler water pure enough to be suitable for use without damaging the boilers. They analyze the coal or BTU,—the ash moisture heat affusion and that sort of thing. They make chemical analysis of [47] various fluids and liquids, in their connection with the operation of the Power Station. They are responsible for making the de-mineralized water that goes into the boiler system. Then we have the Test Department, and this is the department that has technicians that are responsible for the performance of the Power Station, as well as the electrical—the Electronic Maintenance, on specialized control equipment,—the maintenance of the accuracy of the instruments and the gauges and the control devices in the Power Station. They are also responsible for testing the Power Station equipment to be sure that it is performing as it is designed to perform to give us the maximum efficiency overall from the Power Station. They use the results of the coal analysis to determine the overall efficiency of the operation of the station. Then, we have the Labor Department which is a service department of the station, really to all of the departments. In this group—this group is generally responsible for the janitorial services in the Plant. They do a number of miscellaneous labor jobs around the Plant. They will pick up the garbage with the truck. They will occasionally mix mortar in a trough with a hoe or they will help to put some boards up for a form in a boiler when we have an outage. They will clean bolts with a wire brush, when the turbine is down for inspection. They will do a lot of labor-

*A. C. Thies—for Defendant—Direct*

type work of this kind on special assignment, but generally, [48] their work is of the janitorial type. The other two groups that we have are the Security Department—they are the watchmen—then, we have a Clerical Group, and in the Superintendent's office is the Chief Clerk, or Clerical Supervisor, it is, and an assistant. I think this pretty well covers the Station organization.

*By Mr. Ferguson:*

Q. Mr. Thies, will you please state for us the Job Classifications and the lines of progression in each of the departments that you have mentioned? A. Yes, sir. In the Coal Handling Operation, a man would start out there as a Learner. He would progress as he learned, to Helper, and then if he was performing satisfactorily, he would be promoted to Coal Handling Operator, and after he had progressed through the Coal Handling Operator Classification, and if he was qualified to run every job in the Coal Handling Operation competently, then he would be considered for the Premium Pay Classification in Coal Handling, which we call Coal Equipment Operator. If he qualified for that and had progressed through the full range of the Coal Handling Operator Classification, then he would be promoted to the Coal Equipment Operator Classification. Now that is the end of the normal progression in the Coal Handling operation. In the Operating Department, a man would start in as a Learner. If he progressed satisfactorily and could do the work, he would go to Utility Operator. He [49] would progress through that job to the top of that classification. Now, he would not progress beyond the Utility Operator unless there was an opening ahead. There are a certain number of operators required

*A. C. Thies—for Defendant—Direct*

to operate the Station. This is the only department that has a certain number of men—minimum that is required. Then, he is, if there is an opening above, he is promoted to Pump Operator and progresses through that classification. If there are openings in the Control Operator Classification that pertain, he is moved to the Control Operator Classification. Now, this is the end of the normal progression through the Wage and Hour structure. Of course, we do promote from our Control Operator Classification into our Shift Supervisor Classification, occasionally, when we need a supervisor. This is the place that we would normally look for this man. This, I think, pretty well covers the Operating Department. In the Maintenance Department, a man would start out as a Learner; it would progress, if his work were satisfactory, from Repairman to Mechanic B; from Mechanic B to Mechanic A; he could branch out at that time to be either an Electrician, a Welder, or a Machinist. These are the three top classifications in the Maintenance Department, and in this department again, when we have an opening for an Assistant Maintenance Supervisor, we would normally look to the maintenance force to find a man that was qualified to be that Assistant Maintenance [50] Supervisor; so that would be a possible further progression, for him in the future, if he were qualified. In the Laboratory, a man would start out as a Lab Assistant, a Lab Technician, a Lab Man. These are the three progressive steps in the Laboratory. The same pertains in the Test Department. It is called Test Man, Test Assistant, and Test Technician; instead of the word, "Laboratory," it is the same type of progression in these two departments. The Clerk could normally progress only if there was a vacancy as Clerical Supervisor and he were qualified for that job. The Watchmen, if they had an in-

*A. C. Thies—for Defendant—Direct*

terest and were qualified, progress to either the Coal Handling Operations or could progress to one of the departments in the Plant, if they had the educational background, and the requirements. The Laborers in the Labor Department progress from Labor to Labor Semi-skills, and if they meet the qualifications, progress to either the Coal Handling Operations and go on through those, or they can progress into the Plant to feed various jobs in Maintenance or Operation, or they could progress on up to the Watchman Classification if there were an opening there, providing they meet the qualifications.

Q. Mr. Thies, when you were talking about the Coal Handling Operation Department, did you indicate that the lowest—that the entering classification, as it were, was Learner or Helper? **[51]** A. It's Learner.

Q. And Learner progresses to Helper within that classification and then on up? Is that right? A. Yes. This is the normal way it is done.

Q. Mr. Thies, are you familiar with the promotions that have been made at Dan River since July the 2nd, 1965? A. Yes, sir, in a general way.

Q. Would you state whether or not there have been any vacancies and promotions into those vacancies since July the 2nd, 1965? A. Yes, sir, there have.

The Court: The date is July 2nd?

Mr. Ferguson: Yes, sir.

*By Mr. Ferguson:*

Q. You say, there have been? A. Yes, sir.

Q. Vacancies and promotions into those vacancies? A. Yes, sir.

*A. C. Thies—for Defendant—Direct*

Q. State whether or not every promotion creates a vacancy? A. No, sir.

Q. Explain that to us, if you would. A. There could be vacancies created by promotions. In the Operating Group, for instance, when you promote—excuse me—when you promote a Control Operator to Shift Supervisor, that immediately leaves an opening for a Control [52] Operator, so that we must promote a man into that classification. There is a vacancy created that we must fill in order properly to man the controls of the Power Station, so we will promote a man, generally, from Pumper Operator to Control Operator to fill that vacancy. Now, that is a case where a promotion is made and a vacancy is created. There can also be a promotion made from Learner to Helper in the Shop. This would create no vacancy because the man would just be developing in his skills. I said, Learner to Helper; I meant Learner to Repairman, in the Shop, or if he were promoted from Repairman to Mechanic B, it wouldn't necessarily create a vacancy, because it may take only twenty or twenty-five men to do the full scale maintenance work at Dan River. So, even though these men are progressing in skills and are progressing up in the classification, it does not necessarily per se create an opening at the bottom of the list. Now, this is the two types; I hope that I have explained that satisfactorily.

Q. Yes, sir. What is the minimum number of employees that you need to satisfactorily operate the Dan River Steam Station? A. We have not determined a fixed minimum number of employees that we need to operate. We have determined that we needed certain operators in the Operating Department to satisfactorily operate the Station, and we knew by general [53] practice that within our Maintenance Group, we have about the right number of



*A. C. Thies—for Defendant—Direct*

people to stay up with the maintenance work that is done in the Power Station. I am sure that there is some flexibility there, that we could use an extra man or we could do with one less in the maintenance, and it wouldn't shut the Plant down. So there has not been a strict determination of the number in the maintenance number, for instance, and the same thing would apply to the Coal Handling Operations. We know generally that we need so many men to do the job, and if the foreman comes in and says the coal deliveries have been such—have been erratic, or we've had a lot of frozen coal, we really need another, and we really need another man, then I think it would be up to the Superintendent to discuss that with the foreman and they would come to some decision as to whether they needed to employ another man. It's determined really by the work situation, is what I'm saying.

The Court: In other words, this flexibility also, with what you are saying, would mean that a promotion by reason of the fact that you make provision, so that you are flexible and therefore, by reason of that fact, when you promote a person doesn't necessarily mean that you have a vacancy, because often you have more men than you need? Is that it?

The Witness: Yes, sir. And after the promotion [54] to a higher classification the man may be doing exactly the same work every day. He is just gaining skill, and he is paid more money because he is gaining skill, and he's classified higher, but he is doing the same kind of jobs that he was doing before.

The Court: All right.

The Witness: He can maybe be entrusted to some additional jobs or maybe take two of three men with

A. C. Thies—for Defense he has a higher

him, as sort of a lead man  
classification.

By Mr. Ferguson:

Q. Mr. Thies, the Plaintiffs in this case have offered into evidence, certain answers to interrogatories that the Defendant supplied to the Plaintiffs in February, 1967. Who signed those interrogatories? A. Or a document con-

Q. Mr. Thies, this is an instrument marked 19-A Job containing several columnar tabulation of Initial Employment, Date, Name, Rank, Is this what you submitted as answer to interrogatory #19?

A. Yes, sir. I will furnish you a copy, if you would like to see it at this time.

The Court: I would like it. It looks

Te Witness: Yes, sir. It looks like a Xerox copy of it. attached to the in-

[55] The Court: It might be attached to the interrogatory.

Mr. Ferguson: It is. If clerk could just hand that up to the Court.

By Mr. Ferguson:

Q. I believe you testified, Mr. Thies, that that is the answer you supplied in response to interrogatory #19? Is that correct? A. Yes, sir.

Q. Interrogatory #19 requests the Defendant describe and designate each job vacancy and the date the vacancy occurred, which existed in the Company's Dan River Steam Station at any time between July the 2nd,

*A. C. Thies—for Defendant—Direct*

1965, and December 31, 1966, and further, the Name, Race, Date of Initial Employment, Prior Job Classification, if any, of each employee, who filled such vacancy. Does that answer 19A—purport to answer that question? A. Yes, sir.

Q. All right, sir. Now, using the answers to Interrogatory #19, would you please explain whether or not the promotions indicated thereon, created a vacancy into which others could have been promoted from a lower classification? A. You want me to go through this whole list, here?

Q. If you will, please. A. In the case of Mr. Sayars, the first man on the list, here,—that created—let's see, he was promoted to [56] take a Shirt Supervisor job, I believe, so a man was moved up from Pump Operator to fill Mr. Sayars place as Control Operator. Now, I might explain at this point that there were three more there—Pump Operator to Control Operator. At about this time, we decided that we needed a little bit more relief flexibility in the Operating Department of Dan River Station. We don't relieve upward people. We only relieve jobs with people who were in that classification or higher, so that in order to provide us more relief flexibility, we decided to provide a Control Operator on each shift to do relief work—an extra man. At the same time, we had two Pump Operators that were operating in the Pump Room of the Power Station for the three units, and by the addition of certain equipment there, and an analysis of the job which had been made over some years, we decided it was not necessary to have both of those men on that job, so we eliminated one of those jobs in the Pump Room, so we operate now with one man in the Pump Room at all times, instead of two, and we promoted those people up to the Control Operator Classification, who had been in the Pump Room, and eliminated

*A. C. Thies—for Defendant—Direct*

this extra job in the Pump Room. Now, of course, this need was brought about by the fact that our people were getting somewhat older. We have a real stable employment situation and they are entitled to more vacation and more holidays—not more holidays, but more vacation time, and it just made our [57] relief situation a little tighter in the Operating Room, so that was the reason for this increase in relief. Now that covers really the next three men there who were moved out of the Pump Room up to the Control Operator Classification, so these did not create any vacancy as such. The Pump Operator, I believe, is the next one who was promoted from Utility Operator, and he was promoted into a job,—I believe it was a Mr. Pratt who said he didn't want to be in the Pump Room any more. He had some family problem at home, and he didn't want to work shifts—something about his personal situation, so we could arrange it at that time for him to go on other jobs in helping with the maintenance and that sort of thing, and we let this McClung, we promoted him to Pump Operator. And therefore, that created no vacancy in this case, because he was a relief man. McClung was a relief man anyway. He was an extra man in the Pump Room—if you will—he was a Relief Operator, so we had moved these others up, so now we were covering the relief situation by having more all the way around, so we did not need him in the Pump Room. Now, there was no vacancy created there. One of the Pump Operators, the fourth one out of the Pump Room, and incidentally, on a rotating shift, we work twenty-four hours a day, seven days a week, and it's automatically rotated, and there are four positions filled for each classification. It takes four men to fill those positions, plus the relief situation. [58] You've got to have enough people to relieve, too, so any time you talk about

*A. C. Thies—for Defendant—Direct*

a promotion, you are talking about—there are four people in the Pump Room right now, for instance at Dan River. There will be one man on the shift, but there will be four people in the Station that will automatically relieve around—to fulfill the full manning situation, the relief has to be in addition to those people for things like sickness and holidays and vacations. But the Pump Operator, Clarence Amoriello—that's A-m-o-r-i-e-l-l-o, he had some interest in this job, so we at this time were losing a Clerk, so we transferred Mr. Amoriello from the Pump Room into the Clerk's Office. The two next men, were Helper and Learner. Now, they were employed in the Power Station in the Operating Department to do Operation, and they were performing duties—say, Utility Operators normally perform—when they first came on the job, they were in training, you might say, for Utility Operator, so when they had progressed and when there was a need for them to fulfill this whole job by themselves, they were made Utility Operators, so no vacancy was created by their promotion to Utility Operator, because they were already doing that similar job, but under more supervision than they would have to have when they were learning. Jesse C. Martin was a Semi-skilled Laborer, and he was promoted from Semi-skilled Laborer to the Coal Handling operation. Now, he is in line to progress right on up [59] to Coal Equipment Operator, and he in fact, since this answer was given, he has been promoted from Learner to Helper, but at this time, he had just been promoted to Learner, but he is progressing normally through the Coal Handling Operation. There was no vacancy as such created in the Semi-skilled Laborer category, by his promotion, because here again, the Labor Department can fluctuate a few men one way or the other, and the Superintendent just decided, "Well, I will try to

*A. C. Thies—for Defendant—Direct*

get along without him for awhile, and see how we get along. Maybe we can do without him for awhile—do without a Laborer in this area for this time.” From Learner—the next one is Mr. Seigler and Mr. Clark from Learner to Repairman. Both of these men were employed as Maintenance Men and when they progressed through the Learner Classification, then they were promoted to Repairmen. They were qualified to move on. No vacancy was created in the Learner Classification by them moving into the Repairman Classification. Helper to Coal Handling Operator, James L. Williams,—that’s a normal progression; after the man has learned enough and has worked as a Helper in the Coal Handling Operation to where he has progressed through the Helper Classification and understands and can perform the duties of the Coal Handling Operator, he is promoted, and there was no vacancy created by his promotion from Helper to Coal Handling Operator, because he is doing [60]essentially the same type of work as the Coal Handling Operations Helper, as he would as a Coal Handling Operator, except for the degrees of skill and the length of time it takes him to progress to the Helper’s position, so no vacancy was created in Coal Handling per se, by his promotion. In Mechanic B series, two of those were promoted to Mechanic A—from Repairman to Mechanic B—here again, it’s a normal progression. No vacancies were created because these people are doing mechanical maintenance work, and it was just a change in their pay and their classification, as their skills progressed.

Q. Are you saying by that, Mr. Thies, that a Mechanic B, when he is promoted to Mechanic A, still can do what the Mechanic B does, but he has just progressed through skills to a point—in other words, where no vacancy is created, the function is still being fulfilled? A. That is cor-

*A. C. Thies—for Defendant—Direct*

rect. Our policy is—in our Power Stations, we do not work a man up out of his classification. We will permit a higher classified man to do lower classified work but we don't permit a man, who is in a lower classification to work in a higher classification without paying him for that work or re-classifying him. That is a basic policy that we have.

Q. All right, sir. Please go ahead. A. Now, three promotions from Common Labor to Semi-skilled [61] Labor; these are again normal progressions, and normal learning of the individuals. They have progressed through the Common Labor Classification in the opinion of their Supervisor, and the Superintendent. They have learned enough to be classified as Semi-skilled Labor. They still doing possibly some of the same jobs or mostly the same job they were doing before, but they know how to do it better, and they know where the equipment is, and it is just a matter of normal progression up in the skills, so they have created no vacancy by their move. In Mechanic A to Welder is again where a man specialized in welding, and when we felt that he'd progressed far enough through Mechanic A and had demonstrated his ability to weld, he was promoted into the Welder Classification. Now, I believe maybe there is a little overlap in the pay of the two, but at any rate, that's immaterial. This is a normal progression into Welder, and would not create a vacancy as such.

Q. Would you summarize your conclusion with respect to this "19"? A. Yes, sir. There was one vacancy created by Mr. Sayars that was filled from persons already in that department, and the promotion of Mr. Sayar—

Q. Mr. Thies, I don't want you to go back through it. If you will just count up, if you will and state whether or not there were any vacancies created? [62] A. Yes, in the

*A. C. Thies—for Defendant—Direct*

case of—of Sayars—of Sayars, there was a vacancy created, and that's the only one I see on here.

Q. In the course of answering my questions concerning this answer, No. 19, or the answer to Interrogatory No. 19, you mentioned that there was a stable employment situation at Dan River. When was the last time that you hired somebody up there? A. We have hired a man fairly recently.

Q. Well, strike that and let me ask you this question. Have you hired anybody since July the 2nd, 1965 or tell us how many you have hired, if you have? A. Yes, we've hired one man.

Q. In the past three years—or two and a half years? A. Since the date you mentioned—July 2nd, 1965.

Q. All right, sir. Looking at this list, Mr. Thies, I notice Jesse C. Martin, whose race is listed as Negro, was promoted from Semi-skilled Labor to Helper in Coal Handling. Do you know what his education is? A. No. See—was he promoted to—he was promoted to a Learner. He has since been promoted to Helper. I believe he is progressing up—

Q. Do you know what his education is? A. Yes. He was the Senior Semi-skilled Laborer who had a High School education.

Q. Have any other Negroes been promoted from Laborer [63] into higher classifications since July the 2nd, 1965? A. Yes, sir. We've promoted one Semi-skilled Laborer to —to Watchman.

Q. What's his name? A. R. A. Jumper.

Q. Do you know his education? A. He was again the Senior Semi-skilled Laborer who had a High School education.

Q. Well, what created the vacancy into which he moved if there was a vacancy, Mr. Thies? A. In the case of Mr. Jumper?



*A. C. Thies—for Defendant—Direct*

Q. Yes, sir. A. We needed a Watchman. We had a Watchman retire. I don't remember his name or when he retired, but it was back last September, I think, and we needed a man back in there, so naturally, we offered it to the Senior man who had the qualifications, which is a High School education.

Q. Mr. Thies, the Plaintiffs, in their complaint allege that the Defendant pays less wages than to white employees performing the same or similar work. Would you state whether or not Negro and white employees at Dan River ever do the same or similar work, and explain your answer?

A. They can do—on occasions, they can do this same or similar work, but a general statement would be going back to our policy. We do not work a man out of his classification [64] up. We will work him out of his classification down and continue to pay him as that, but basically, the employees that are—that are doing maintenance work, their job is maintenance, and that's what they normally do. Now, on occasion, the Mechanic A may pick up a broom and sweep out the Shop, and that's what I mean when I say that they occasionally do the same or similar work because that is normally the job for the Laborer—Labor Department, but if the Mechanic A is there and he's got chips in his way or what have you, or if he's got a little time on his hands and nothing to do, he may say, "Let's pitch in and clean up these chips in front of the Lathe a little bit", so to that extent only are these people doing the same or similar work. I can think of other occasions—for instance, when we had a boiler off the line. This is a real pressure time for us because any time a boiler is down, we have got capacity off the line, and we make every effort to use—we use planning to get our work done in a minimum time to get that equipment back in service to meet the load, so

*A. C. Thies—for Defendant—Direct*

everybody pitches in, and for Laborers, they will, as I mentioned before, they will occasionally maybe mix some mud, they call it,—it's a material they put in these Ash Hoppers—a Laborer may be in our—there may be a Mechanic in there mixing with a hoe at the same time, but that is not normally the Mechanic's work, but he is being used there because this is a real emergency situation [65] to get this thing back. The jobs that the laborers are doing under those conditions are Labor jobs. They are simple manual tasks that laborers do.

Q. Where the Mechanic is doing Laborer's work, what rate of pay would he be getting? A. He would be getting his regular rate of pay as a Mechanic.

Q. Mr. Thies, have you read the depositions of the Plaintiffs in this case? A. Yes, sir, I have read through them.

Q. If the Court would permit me, I'd like to lead him for just a minute so I can get the problem before him.

The Court: Go ahead and ask your question. If the Plaintiff objects, we'll indicate it or we'll make a ruling.

Mr. Ferguson: All right, sir.

*By Mr. Ferguson:*

Q. Some, or at least one of the Plaintiffs in this case, indicated in his deposition that at one time, he was knocking doors and that now—first of all, tell us what "knocking doors" is? A. On the coal cars that come in, they are unloaded from the bottom, and there are the large metal doors on the bottom that are held by rotating dogs and you take a hammer and tap this dog and it rotates out of the way and you do this on both sides of the car, and

*A. C. Thies—for Defendant—Direct*

the door just swings open [66] by gravity, and the coal runs out of the car.

Q. I see. Now, one of the Plaintiffs in his deposition, Mr. Thies, stated that he used to knock doors, but since that time, white employees are now knocking doors, and that they receive a higher rate of pay for doing that job than he did. Now, would you comment on that, and explain it to us, if there is any explanation?

Mr. Belton: Objection, Your Honor. It's leading and if he has read the deposition, he should identify the Party.

The Court: Can you identify the deposition, Mr. Thies? Do you recall?

The Witness: I don't remember which man.

The Court: Are you familiar with the deposition?

Mr. Ferguson: Yes, sir, I have notes here. It will take me a little while to look it up, Your Honor, but I can get it for you.

The Court: No, wait a minute. Do you recall in one of the depositions that testimony to that effect was given, Mr. Thies?

The Witness: Not word for word, but I remember that the man made such a statement—yes, Your Honor.

The Court: You do remember that one of the depositions—remember that in one of the depositions?

The Witness: Yes, sir.

[67] The Court: All right. Overruled.

The Witness: Some years ago,—many years ago, our Laborers came to us and said that they were doing this work of knocking these dogs loose on the bottom of the coal cars as they came in and that

*A. C. Thies—for Defendant—Direct*

they thought that was a Coal Handling Operator's work. Now, we didn't think so, and we still don't think so. We think it is Labor work. Knocking the dog loose to drop a door down is Labor work as far as we can see, and still feel that way, but at that time, the decision was made that we would make a point of it—we would make an issue of it; if it was making the employees in the Labor Group unhappy, we would just provide that the Coal Handling Operators would do this job, and so they were at their request taken off of this work because they said it wasn't something that Laborers should be doing. Now, we still feel that it was Labor work, but we didn't argue with them. We just agreed to it and let the Coal Handling Operators do it.

Mr. Ferguson: All right, sir. If you would bear with me just a minute. Your Honor—

The Court: In other words, you are saying, Mr. Thies,—is this right—that you were letting personnel from your Labor Division do the knocking of the doors, at one time, and then you changed that in view [68] of, shall we say, some contention about it, and you let those from the Coal Handling Department do the door knocking, and do I understand that from that, that I might surmise that those from the Labor Department who were doing that job, knocking doors, were paid less than those in the Coal Handling Department, who were knocking doors? Is that what I surmise out of this?

Mr. Belton: Your Honor, before you ask the question, I would like to raise something at this point, and I call your attention—well, let me state the point, first, that we have attempted to get informa-

*Colloquy*

tion both in the interrogatories and in depositions of the operations and facts pertaining to the operation, the promotion, and etcetera of the Company prior to July 2nd, 1965, which is the effective date of the Act and in particular, I call your attention to Deposition #11 which is the deposition that we took of Mr. Thies in which we posed such a question on Page 20. Now, we have no objection to going back, but we think that to the extent that the Defendant can go back and get these events that occurred prior to 1965, then, we should likewise be permitted to do so, and I raise that at this point because I'm quite sure we will have questions.

The Court: When has this happened?

**[69]** Mr. Ferguson: It has not been established, Your Honor.

The Court: Well, let's establish it, and it wouldn't be important back of July 2nd, '65.

Mr. Ferguson: All right, sir, I withdraw the question.

The Court: Or would it?

Mr. Belton: We have no objection to going back, Your Honor, but they have interposed and instructed their witness not to answer. In fact, they instructed this one not to answer a question pre-dating July 2nd, 1965. We take the position that some information as to the operation of the Company is relevant to what is going on now, notwithstanding the fact that the Act became effective July 2nd, 1965, because we think it's impossible to understand now, unless the Court has some appreciation of how the Company operated as to promotion and hiring.

*Colloquy*

The Court: Here was a law, and presumably, if they were doing something that was incorrect and here is a law that prohibited presumably—and I say presumably, they would amend whatever they are doing to comply with that law, so I am not exactly clear on the fact that what transpired before July 2nd, '65, would help to decide the issue as to whether they discriminated after [69] July 2nd, '65. I would rather think that what transpired before would have little bearing on the issue of what happened after the effective date of the Act, unless we can pose the old rule, "Something that is established is presumed to continue," or something like that, but I hate to do that in view of the Law. Well, let's keep it after July 2nd.

Mr. Ferguson: All right, sir.

The Court: If that's your question?

Mr. Ferguson: Your Honor, the reason for my asking that question was that this is so difficult to go through a set of depositions and interpose objections every time when you ask a question, and you don't specifically tie it to that date. Now, in this particular deposition—now, on occasions I did object to it and directed the witness not to answer, but as I look through this deposition, he hadn't tied it down to any particular date,—the witness, at the time, and I am perfectly willing to withdraw it, but I felt like that this was an area where we had to meet that proof because it is not tied down in his deposition as to whether that occurred before July the 2nd, '65, or after, and that's the only reason.

The Court: Can he tie it down?

*Colloquy*

Mr. Ferguson: Yes, sir, I think he can, but his [70] answer would probably be stricken.

The Court: You withdraw the question?

Mr. Ferguson: Yes, I withdraw the question.

Mr. Belton: Your Honor, I don't want to belabor the point. Well, we will meet this again, I am quite sure, at the time that we are given an opportunity to cross examine the witness.

The Court: That means, I'm not going to let you ask him about it prior to July 2nd, 1965.

Mr. Belton: We're precluded, Your Honor?

The Court: I'm not going to let you ask, and I'm certainly not going to open it up on cross examination. Isn't that the basis you all have taken these depositions on—that July the 2nd was the cut-off date?

Mr. Belton: No, sir, Your Honor. That has been a point of contention with respect to interrogatories, and it also has been a point of contention with respect to the depositions, and it has never been ruled upon because the Defendants take a position contrary to that of the Plaintiffs. We take the position that some information as to what transpired before July 2nd, '65, is relevant, and we have not been operating under—that we have been limited to that date. We feel that it is relevant.

The Court: I don't see that what transpired prior [71] to the Act—the effective date of the Act would be relevant on the issue—that you all really agree, you know. I have to answer in this as set out. You differ somewhat in the Final Pre-Trial Order. You break it down—Paragraph 16—the Plaintiffs do, but each time, in reference to Title 7 and the Civil Rights

## Colloquy

Act of '64, and it is a fac

date. There's no disagree July 2nd, '65 is the

Mr. Ferguson: No, sir, about that, is there?

Mr. Belton: Of the effe

The Court: Well, you l late, no, sir.  
you can go back, you kno problem of how far  
relevant evidence is that am ruling that the  
events transpiring—the e is restricted to the  
sition, July 2nd, 1965—y

Mr. Belton: Your Hon date of the acqui-  
what transpired on the dly proceed.

The Court: What did y<sup>a</sup> this point, as to

Mr. Belton: I'd like to  
what it might show. ?

The Court: You may oer the evidence on  
course have indicated tha  
would be competent, but e evidence, and I of  
tect you on the record, an not think that that  
it in, so that it might bealy, I want to pro-  
an appeal. [72] Whether ll allow you to put  
but I don't see how that ved in the event of  
I am in error on it and could be all right—  
then it would have to com help you, because if  
Court to make some dete not considered it,  
go back again, but if you you know, for the  
would like to offer the e ion on it, and then  
actually filed with the Co you think that you  
you may do so.

Mr. Belton: What—ju and then have it  
tences, Your Honor. I wo d show my ruling,  
attention to several cases  
that we are taking. These of two more sen-  
That Have Been Decided to call the Court's  
upport the position  
itled, "Seven Cases  
e Merits." I don't



*Colloquy*

have the citation on hand, but I can get them for you for the Court's perusal. One is, *Bowe-Colgate, B-o-w-e-Colgate*, in which the Court allowed the Parties to introduce evidence as to activities back to World War II. More in point is a recent case. This was a sex discrimination case under Title 7, more recently, *Quarles vs. Phillip Morris*, involving racial discrimination, in which the Court did allow the Parties to go back to at least 1959, if you will, in terms of the steps that were supposedly undertaken to eliminate the problem, and the bearing that they would have had on what the Defendant was doing presently under the Act. As I said, I don't want to [73] belabor the point.

The Court: Well I just simply can't see. If a fellow were speeding on January 10th, 1968, and he is apprehended, and I realize this is not a criminal case, and then, he is apprehended again on January 15th, I don't know—we all agree what took place on January 10th has no bearing on whether he was or was not speeding on January 15th. That seems rather elementary to me. I'd be interested in reading the case. Do you have the citations? During the recess, would you give them to Mr. Blanco?

Mr. Belton: Right. The other one I have is just a mimeographed copy. I can make a copy of it available to the Court.

The Court: All right. I'd like to see it.

Mr. Belton: And to Counsel for the Defendant.

The Court: I reserve the right to change my mind, if these cases will convince me that I should. All right.

*A. C. Thies—for Defendant—Direct*

Mr. Ferguson: I assume Your Honor is going to let me be heard at the time?

The Court: Yes.

Mr. Ferguson: All right, sir. Thank you.

*By Mr. Ferguson:*

Q. Mr. Thies, are you familiar with the Company's policy regarding overtime at the Dan [74] River Steam Station? A. Yes, sir.

Q. On what basis are overtime opportunities provided? A. There are two bases for overtime at Dan River. The first is what is called, "Scheduled Overtime." Each employee at the Power Station works an extra day every fourth week—one extra eight-hour day. He works a normal forty-hour five-day week, and every fourth week, he works six days or forty-eight hours that week. Now, that eight hours is at overtime rates. Now, this is called, "Scheduled Overtime." The other type of overtime is categorized as "Emergency Overtime," or "Call-out Overtime," if you will. This overtime is kept to an absolute minimum, consistent with the needs of the operation of this Power Station. I instruct the Superintendents to keep this as low as they can because this is a direct cost to the operation of the Station, above and beyond the normal pay of employees, and it adds to the Station's operating cost. So this is emergency operating time only, and we use it only in classifications where a man is necessary to be called out, and under emergency situations, where we have to have more man power than can be provided by the normal working hours of the employee. So these are the two types, really of overtime that we have at the Power Station.

Q. Mr. Thies, in answer to Interrogatory #34—[75] Interrogatory #34 requested the following information:

*A. C. Thies—for Defendant—Direct*

State the Name and Race of each employee who has worked overtime on any job at any time since July the 2nd, 1965, and with respect to each employee, indicated, A, the dates on which such employee worked overtime, and the job performed by working overtime. I hand to you an instrument that has a heading, 34A and B with the following columns, Date, OT hours, Name, Race, Job, OT hours. There are two columns there of the same thing, consisting of twenty-six pages, and ask you if that represents the answer that you gave to Interrogatory #34. A. Yes, sir. That appears to be a Xerox copy of it.

Q. Mr. Thies, have you made an analysis of these twenty-six pages and the overtime opportunities as were provided to employees listed on those twenty-six pages; that is, from July 2nd, 1965 until February, '67, or answers to interrogatories when they were supplied? A. Yes, we did.

Q. What did your analysis show, if anything? A. Well, we broke this list down by departments, within the Power Station, and we took the figures off of these sheets, as to the actual overtime hours that were worked by these employees, and we knew the straight time hours, and we came up with a figure by departments in the Station, that gave the percentage of overtime hours worked [76] to total hours worked by the employees, within these departments. It showed, for instance, that in the Coal Handling Department, the employees in Coal Handling Operations worked 10.39 per cent of their total working hours were overtime hours. In the Labor Department, 5.22 per cent of their hours were overtime hours. In the Operating Department of the Power Station, 5.39 per cent—very close to what the Laborers were—a little bit more than the Operating Group, were overtime hours. In Maintenance, 7.84 per cent of the total hours worked were overtime hours, and

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in the other departments which we lumped together—the other departments, the Testing and the Laboratory and the Clerical and the Watchman, the lowest of all in the Power Station, was 5.19 per cent of their hours were overtime hours.

Q. I noted, Mr. Thies, that Coal Handling got 10.39 per cent of the overtime. Is there any reason for that? A. Yes, sir, for the period covered here, we had problems getting uniform delivery of coal. The coal market in this country was badly upset, and actually coal was hard to get and shipments were very erratic, and we would get slug—slug with many, many cars of coal, and then, there wouldn't be any cars for awhile, and this was the result—of working overtime hours—to prevent paying demurrage on such many cars of coal. Also, we had some frozen coal during this same period covered, which required working [77] overtime in the Coal Handling Operations to get that coal unloaded and into the bunkers for a continuous operation of the Power Station.

The Court: What do you mean by "frozen" coal?

The Witness: The coal actually freezes, and there's enough moisture that gets into the car, with it cold, and it freezes. Mostly, it freezes in from the sides, a foot or a foot and a half, and you can't unload it. It will come another car so we have to get in there and put—and put heat under the cars. We have to get in—we have to get in with car shakers, and shake these cars. We beat on the side of—sides of the cars with hammers, to try to break this up, and in many cases, we are unsuccessful, and we have to push these cars off down the track and let them stay in the sunshine, if it's sunny that day,

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and let them thaw a little bit, and then bring them back, and it is more than you can do in eight hours time to get enough coal unloaded to get it into the bunkers to operate the Station.

*By Mr. Ferguson:*

Q. With respect to the frozen coal situation and other situations, where you have excess amounts of coal to unload, is this overtime work a voluntarily or involuntarily—  
A. Well, we ask our employees to stay over on [78] call-out, and in almost all cases, they cooperate with us very well. You might say, it is requested of the employees to work this overtime. If a man has a special situation that he has got to get off for, we give consideration to that; if he's got problems or something and can't work—work it, we make arrangements. We might even call out someone in another department to come in and help temporarily, if we didn't have enough men in that department to do the work. Now, there are some Laborers, who clean up, in Coal Handling, and under these overtime conditions in Coal Handling, in the case of the frozen coal, there's just not as much cleaning up to do, because we aren't unloading the coal at as rapid a rate. In addition to that, at night, it's rather dangerous to be in, cleaning up under these conveyor belts, in the condition at night where the darkness—and it isn't as light at night, and it isn't as safe to use clean-up people.

Mr. Ferguson: I believe His Honor had a question.

The Court: When you get to a point where it will interfere as little as possible in this examination, we will take our noon recess.

*A. C. Thies—for Defendant—Direct*

Mr. Ferguson: We're just about there, Your Honor.

The Court: Are you about to conclude your examination?

Mr. Ferguson: No, Your Honor, I think it would be [79] better if we adjourned for lunch until we got to the other area.

The Witness: I might say, in further reference to this analysis that we made,—to me, it illustrates very clearly that we call out only those skills that we need. For instance, the Maintenance people get 7.84 of their time as overtime hours, indicates for equipment break-downs, we had to call on their services on an emergency basis quite frequently, whereas, the Operating Personnel and the Laboratory and Test Personnel, we didn't need as much. In fact, we needed the Laboratory and Test Technicians, least of all, and so they weren't called out. They have a lower overtime, percentage-wise than any other group or department in the Plant, so we call out the people that we need as required by the job, and we limit this overtime as "Emergency Overtime," but everyone else gets the same amount of "Scheduled Overtime,"—all departments.

Mr. Ferguson: Your Honor, I believe this is a convenient place, if it's all right with you?

The Court: All right, Mr. Thies, you may come down.

(Witness excused.)

• • • • •

[80] Let's take a recess until 2:00 o'clock.

(Lunch recess was taken.)

*A. C. Thies—for Defendant—Direct*

The Court: Mr. Thies, I believe you were on the stand, sir. If you will please, come back.

(Witness resumes the stand.)

All right, you may proceed.

*By Mr. Ferguson:*

Q. Mr. Thies, when we recessed for lunch, you had finished stating what your analysis of the answer to Interrogatory #34 showed, and I believe you stated that Coal Handling had 10.39 per cent of the overtime total—that is a percentage of the overtime to straight time hours. I believe you further stated that this was attributed in part to the frozen coal situation that existed during this period of time at the Dan River Station. Would you state, please, sir, what is involved in the frozen coal situation—what kinds of jobs have to be done in connection with thawing the coal, if that is what is done? Explain that to us, please, sir. A. Well, I thought I had pretty well gone over the routine part, Mr. Ferguson. Now, maybe I didn't say that this part I explained was only an occasional circumstance, when the coal would be frozen, and is really only a small part of the total Coal Handling Operation. In other words, that's just preliminary, really, to the Coal Handling Operation as such. The unloading of the coal is just a preliminary [81] step, really.

Q. Now, Mr. Thies, as Vice-President of Production and Operation, you are responsible for the promotion policy at Dan River, are you not? A. Yes, sir.

Q. As of July 2nd, 1965, what was the promotion policy at Dan River? A. I will just put this in my own words. The promotion policy of Dan River was—was within the departments, to promote the senior man to any job vacancy

*A. C. Thies—for Defendant—Direct*

that comes open, if qualified,—the next senior man in the lower classification, if he's qualified. Now, that's within departments of the Power Station. Now, between departments of the Power Station, the policy is that any individual who is working in one of the so-called "outside" departments at the Power Station—outside of the Station, proper—

Q. Such as what? A. Such as Coal Handling or Labor or Watchman. In order to be qualified for a promotion to the higher skilled jobs within the Power Station, they must have a High School education or we would accept a GED equivalent of a High School education.

Q. What does "GED" mean? A. I think that is a General Education Equivalent that's issued, for instance, by the Armed Service people.

**[82]** Mr. Ferguson: I'd like to request that the Reporter mark this as "Defendant's Exhibit 1."

(Defendant's Exhibit 1 was marked for identification.)

Q. Mr. Thies, this is a document which has been marked for identification as the Defendant's Exhibit #1, and I show it to you and ask you if you recognize it? A. Yes, sir, I do.

Q. What is it? A. It is a letter that I wrote to all Power Station Superintendents on September 22nd, 1965, modifying our promotion policy as regards to the promotion of personnel from the outside departments into the Station.

Q. In what respects does it modify the policy? A. It sets forth the fact that I would accept a passing score on the two tests that are normally used for employment, as



*A. C. Thies—for Defendant—Direct*

satisfying or in lieu of the requirement that our policy has had for a number of years—that a man have a High School education to be considered for the more highly skilled jobs.

Q. Does this policy apply to everybody? A. Yes. I might tell you a little bit about how I got into this. The employees in Coal Handling Operations had for some years approached me as I made visits around, and asked me if there wasn't some way they couldn't get into [83] Maintenance, for instance. A man would say, "I think I can do Maintenance work." Well, if he didn't have a High School education, then he wasn't eligible to come into these higher skilled jobs, and this was because we had found from experience that we were getting individuals—before we had this requirement, we were getting individuals who couldn't progress through the classifications. They were limited, and they would stop. So, I felt like that, all right, on July the 2nd, we had put into effect some tests for employment that were designed to yield us a man of average intelligence to be a Duke Power employee, so I seized on these tests as being a possible way that I could free-up these men who were blocked off,—that they could use this means of showing me, "All right, I can do the job. I've got a general intelligence level that would permit me to have a reasonable chance of success in some of these higher jobs, even though I don't have a High School education for some reason." Now, there is no requirement that anybody take these tests. The letter just states that we will accept these in lieu of a High School education, and of course, the making of these two scores on these two tests is not mentally equivalent to a High School education. I just said that I would accept those scores as an indication that a man had enough intelligence to be reasonably assured of being suc-

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cessful in the more skilled jobs in Operation and Maintenance, in these [84] sort of jobs.

Q. Now, in point of time, to whom was this requirement extended, or was this privilege extended? A. Now, I did not feel that we should offer this to new employees coming into the Plant, because they had to meet the established hiring practices which were to have a High School education and also, to have a passing grade on these two tests. That's the requirement for employment in other than the Labor Classification. Now, if a person wants to apply for a Labor Job only, then, he is permitted to take a very simple test, which I believe was introduced this morning—this Revised Data Test—and that only qualifies him to be a Laborer, but this test applies to all employees at the Station—Negro, white,—both alike.

Q. Does it apply to employees who are presently employed? A. Yes, it does. Now, all right, I lost the "train" there; just a minute. I didn't feel that it was right to extend this to the new employees, but everyone who was on the Pay Roll as of September 15, 1965, I said, could be covered, under this modification, or if you will, I liberalized the requirements a little bit to try to help folks qualified for these higher jobs.

Q. Is your testimony, then, Mr. Thies, that the policy is to accept minimum acceptable scores on the two [85] tests referred to in your letter, which are the Wonderlic and the Mechanical AA, to accept those scores in lieu of a High School education, and that policy is applicable only to those who were on the Pay Roll, as of September the 15th, 1965? A. Yes, sir.

Q. Is that the policy? A. Yes, sir.

Q. Now, Mr. Thies, what does the letter show—this Plaintiffs' Exhibit 1—as a minimum acceptable score on

*A. C. Thies—for Defendant—Direct*

the A. F. Wonderlic Test?—I'm sorry; that's Defendant's Exhibit 1. A. 20, on the Wonderlic.

Q. And what for the Mechanical AA? A. 39.

Q. Now, how were these scores determined, Mr. Thies? A. These scores were determined by the Personnel Department of Duke Power Company in consultation with Dr. Moffie, Consulting Psychologist, and were put into effect over the whole entire system for employment tests, to yield us the type of individual that we felt that we must have.

Q. Do you know what the 50th percentile of the High School graduates make on the Wonderlic Test? A. I believe it's 21.

Q. 21? [86] A. 21 or 22. Somewhere in between 21 and 22.

Q. And you have accepted 20? A. Yes, it's my understanding that—this is a level that is between 11th and 12th grade capability—somewhere along in there.

Q. State, if you know. Mr. Thies, what the 50th percentile of those having completed the 12th grade make—that is, what is the norm of the average High School graduate on the Bennett Mechanical AA? A. I believe it's this 39 that we have here.

Q. Now, is there any flexibility with respect to these minimum-acceptable scores? A. Yes. We have instructed our Personnel that administer these and grade them that if a man is one point over on the Wonderlic and one point under on the Mechanical AA, we would accept that and vice versa. I mean, we have said that we would take one point less on one test, if he's one point over on the other, but we have held to those limits.

Q. It has been stipulated, Mr. Thies, that Mr. Richard Lemons — that Lemons administers the tests at the Dan

*A. C. Thies—for Defendant—Direct*

River Station — do you know whether or not Mr. Lemons has any special training in the administration of tests?

. . . . .

[87] . . .

*By Mr. Ferguson:*

Q. Who administers the tests at Dan River? A. There are three people who are capable of it, so that our Mr. Richard Lemons has administered the tests at Dan River, and he has had training in this. He went to Charlotte and attended a training session, which explained to him along with others in the Company that would administer these tests, the method of administration—how to score the tests, how to provide the materials for the employee, and the use of the test manuals, and it's a fairly simple thing [88] to administer these tests. They have strict rules and time that you must go by, and generally it was instruction of the personnel that would administer the test, and how they were to be administered.

Q. Who conducted the training session? A. I'm not sure who conducted that session that he was in, but it was someone from the Personnel Department, I believe. I believe that Girard Davidson was in charge of the session. Mr. Austin was at the session. I'm not sure who conducted the session.

Q. Do you know whether or not Mr. Lemons also scores the tests? A. Yes, he does.

Q. Where are the tests administered? A. We have a Conference Room there that is a place that is a little smaller than this Courtroom, that has tables and chairs, and it's a quiet place, and it's free from disturbance and generally, this is where the tests are administered—in a

*A. C. Thies—for Defendant—Direct*

place where there wouldn't be—wouldn't be distractions to the person taking it.

Q. What, if anything, is your policy as to re-testing for failures? A. Well, we felt like that—a man could conceivably be nervous when he was first taking this test, and for some reason, feel bad, or make a poor score the first time, so I [89] instructed the folks to re-test again in six months; if the man did not pass and wished to take it again, we would give it to him again in six months.

The Court: Where is your Dan River Plant?

The Witness: It is close to Draper. It is between Leaksville and Spray—over in that area.

The Court: That's the general vicinity that it's in?

The Witness: Right.

*By Mr. Ferguson:*

Q. Is there any limitation on the number of times that an applicant may take the test? A. No, there is no limitation on this, and there's no requirement that he take the test. It is perfectly voluntary. We've had the requirement for years and years and years that you had to have a High School education, and this is just a way, if he didn't have a High School education,—that I would accept these scores in lieu of that.

Q. Does the Company have any other policy whereby an employee may get an education or may get a High School education, if he so desires? A. Yes, we do. In fact, I have encouraged the folks in this particular action, to take advantage of the Company's tuition refund. I talked personally to a number of them, and asked them to consider this at night or on their own time—that the Company would pay three-fourths of the [90] cost of

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any expense, and that we would consider this type of training to get a High School equivalency certificate, as job related. So far, I believe only one has applied under Tuition Refund. I believe one man—

Q. Now, you say, "One man;" do you know what his name is? A. I forget which one he is.

Q. Is he one of the Plaintiffs? A. I believe he is, yes,—one of the Plaintiffs in the case. I believe he has applied under Tuition Refund, but this is a means by which they could meet this High School diploma requirement.

Q. Mr. Thies, have any Negro employees taken the test? A. Yes, sir, they have.

Q. Have any white employees taken the test? A. Yes, sir, they have.

Q. Do you know whether or not they passed or failed? A. None of the white or Negro; employees who have taken these two tests so far have passed both tests successfully. There are three who have taken them.

Mr. Ferguson: Your Honor, if I could just have a couple of minutes to get my things together here.

The Court: All right.

*By Mr. Ferguson:*

Q. Mr. Theis, this is a document [91] that is entitled, "Registration and Application for Tuition Refund, Duke Power Company." I previously asked you if you knew whether or not any of the Plaintiffs had made application under the Tuition Refund Program. Does this refresh your recollection? A. Yes, sir.

Q. What is the name? A. Willie R. Boyd, Semi-skilled Laborer.

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Mr. Ferguson: Your Honor, at this time, I don't desire to enter into evidence the charge that we received from the Equal Employment Opportunity Commission for which we gave a receipt, in view of the position I have taken that the Statute rules such evidence incompetent. I would, however, like to ask Mr. Thies whether or not this is what he receipted for, or is this representative of what he receipted for, and I would like to go through it in that way, if I may?

The Court: It's up to you as to whether you want to introduce it or not. I'm not insisting that you do. Whatever the Commission has said about it is not going to have any bearing on me one way or the other, you know. Really, what they put in there—I will have to look at it from the evidence that's before me, to determine whether there is or is not.

Mr. Ferguson: All right, sir. That completes [92] my examination of this witness.

The Court: I'm learning about this case. You already know about it. You obviously require a High School education. You say, for years and years, you required a High School education in connection with some of your classifications and some of your jobs. In which jobs have you required a High School education or its equivalent, Mr. Thies?

The Witness: For over ten years, we have required a High School education for Watchman, Coal Handling Maintenance, Operating, Lab and Test jobs.

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The Court: Well, maybe, if you will approach it from the other end? What didn't you require?

The Witness: Labor.

The Court: Just Labor?

The Witness: Right.

The Court: But if—

The Witness: Your Honor, we've had some experiences. The nature of our business is becoming more complex all the time. We have got seven or eight computers on order. We are moving rapidly into the nuclear power area with our Leconia Station. We use our existing Power Stations as a nucleus pool from which to draw man power with the skills required to move into new Stations—new locations, and they form [93] the nucleus of the experienced people, into moving into these more complex areas. Many years ago, we found that we had people who, due to their inability to grasp situations, to read, to reason, to have a general intelligence level high enough to be able to progress in jobs—that we were—that we were getting some road blocks in our classifications in our Power Stations, and this was why we embraced the High School education as a requirement. There is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt that this was a reasonable requirement that would have a good chance of success in getting us the type of people that are required to operate the more complex things that we are faced with all the time, and this was the reason behind this. Now, the reason that we offered



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the test, was an effort on my part that backfired. I was trying to help people who didn't have this, to some way get around going through all this schooling—to take English and Spanish and all this other stuff, which really didn't bother me too much. If they had the intelligence to do the job, that's all I was interested in, but I didn't want to break my policy because then, I would have to take people in that I knew didn't have the skills to do [94] this, and they would have a hard time with it. This was the background behind it.

The Court: I just wanted to be informed. I don't complain about your policy at all. I understand that the shoe manufacturing Company up in Wilkesboro, has the very same policy, even with janitorial help—that unless you have a High School education, why, they don't want you, because it does, as you say, interfere with their in-planned promotion, which sometimes brings on complications. All right. Mr. Belton, you may cross examine.

*Cross Examination by Mr. Belton:*

Q. I think, Mr. Thies, you testified at the beginning of your testimony as to the kinds of jobs that were performed by various employees in the respective categories that you have at Duke Power? Is that correct? A. Yes, sir.

Q. Let me ask you, do you have written job descriptions? A. We do not.

Q. On what basis do you determine what the job content of a particular job category would be? A. It's determined by practice and by many years of doing these jobs, and by an understanding between the Supervisor and the

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man in any classification as to what his duties [95] are. It is explained to each man what his classification is. He knows from actual practice what his job requirements are, but these are not written out, as such.

Q. Have the job content in performing a job, has it changed over the years? A. Not appreciably, no.

Q. I think you testified, Mr. Theis—let me show you because I'll have reference to it. Mr. Theis, do you have before you Answer Interrogatory #12B which lists the job classifications? A. 12B?

Q. Yes. I think it was handed to you by Mr. Ferguson? A. I've got it in here somewhere. 12A and C, I've got. Let's see. Yes, here it is—12B.

Q. Referring to Answer 12B of the Interrogatories, is a listing of the job categories in the various departments. I think you testified that the normal way for a person to advance in any one particular category would be starting at the bottom—starting at the bottom lowest job and moving up to the next highest job? Now, is that correct? A. That's the normal way, yes, sir.

Q. My question is, have there been instances in the past five years in which an employee has not moved up the progression chart in the normal way that you referred to?

[96] Mr. Ferguson: Objection.

The Court: I will allow it, restricted to since July 2nd, 1965, the effective date of the Act.

The Witness: Your question is—if I understand it correctly—is are there any employees who have not moved up the progression scale in the normal way, when a vacancy was created above?

Mr. Belton: That's correct.

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The Witness: Yes, there have been some. I'm sure whether it was prior to July 2nd or after, but I know in one case, we had two men in the Pump Room at the Power Station—the Pump Operators—that were not High School graduates, but had been there for many years, and when time came for promotion, they said, "We can't do the Control Operator's job, and we don't want to be promoted," so we moved around them, but I don't know of any other particular ones.

*By Mr. Belton:*

Q. Referring to Answer 12B again, and particularly the category of Laborer, how long have you had a job classification for Auxiliary Service Man? A. About— oh, a year and a half or a little less, maybe.

The Court: Now, what do you mean by Auxiliary Service people?

The Witness: An Auxiliary Service Man was a [97] classification which we created, and I'm not sure of the date, but it was a year or year and a half ago, into which—into which we could promote anyone in the Power Station, but particularly the semi-skilled Laborer who exhibited skills that were extraordinary. Maybe he could do a little bit of rough carpentry work or some brick work or something like that, or maybe he had other special skills that warranted a little bit more money even though he could not be promoted due to his lack of a High School education, into the higher classifications in the more skilled jobs—that this was a way to reward the man with a special skill that might come

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along, and it was just a merit classification that we put in there. At the present time, there is no one in this at Dan River.

The Court: Let me ask you this, Gentlemen. I am going to call on you when this matter is completed, to give me proposed Findings of Fact and Conclusions of Law. Each of you, now, are you going to want a copy of the transcript in this case?

Mr. Ferguson: Yes, sir.

Mr. Belton: Yes, sir.

The Court: It has something to do with my note taking. I can listen better if I don't have to take notes. All right.

**[98]** *By Mr. Belton:*

Q. Looking again at 12B which you have before you, were the jobs performed—and I understand that you testify that you have no persons in the Auxiliary Service category—would the jobs performed by a person in the Auxiliary Service category, have been jobs which would have been performed by persons who,—in the Labor semi-skilled category? A. That's a little bit difficult to answer, but I will try from this standpoint. It's almost like the explanation I gave this morning—for a promotion from Mechanic B to Mechanic A. The man who received this promotion to Auxiliary Service Man, might have as his normal duties, doing janitorial work, say, in an area of the Power Station, and this still might be his normal duties, but he had the special skills that on occasion we called on him to exercise these special things that warranted his promotion to Auxiliary Service Man in the first place. Then, certainly he would be an Auxiliary Service Man, and he would still normally be doing his other job, but

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he would also have these skills that had caused us to promote him in the first place to Auxiliary Service Man, so I don't know whether this answers your question or not, but he could be doing some of the same things he was doing before he was promoted. It is not—there is not a sharp line of demarcation, and it doesn't create a vacancy. He is not satisfied, and he [99] doesn't become a specialist, by any means, but he is still doing his regular job.

Q. Do you have any white employees in the Laborers Department in the job category of Laborer, referring again to your 12B? A. No, sir, we do not.

Q. Do you have any white job category Laborers, semi-skilled? A. No, we do not.

Q. Now, do you know whether the Labor Foreman is Negro or white? A. He's white.

Q. Do you know what his educational background is? A. He does not have a High School education, but I couldn't tell you just how far he got in school. I don't remember that detail.

Q. Do you know whether you have an Assistant Labor Foreman? A. No, we have no Assistant Labor Foreman.

Q. Now, my question is this,—did you have whites in the job categories below Labor Foreman prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained. I have read parts of this decision, and I see nothing—there was evidence that [100] went in prior to July 2nd, '65.

Mr. Belton: Your Honor, even though it's not demonstrated, in the opinion that you have before you—

*Colloquy*

The Court: It doesn't say whether it's objected to or not.

Mr. Belton: Right. As I am saying, and I am trying to explain the circumstances to which I have brought it to the Court's attention; the case was handled—persons held the same office, which associated—I know the same objections were raised.

The Court: Well, how far do we go back then? Do we go back to July 2nd, '64 or to July 2nd, '63, or just where do we go with this, then?

Mr. Belton: Your Honor, I think it depends on the particular line of evidence that is being developed. I think that under—in any area that the Party should be able to go back at least as far as July 2nd, 1964, which is the date that Title 7 was passed, along with other portions of the Civil Rights Bill. However, there is legislative history to indicate that the reason why Title 7 did not go into effect on July 2nd, '64, as did other provisions of the Act, was to allow a period of adjustment.

The Court: To allow a period for them to get in compliance—

[101] Mr. Belton: The question that we have before us now, your Honor, in this case is whether the Parties are in compliance, and in order to determine whether they are in compliance, we cannot focus specifically on the date in which they were supposed to have been in compliance, at least when they apply it to this, at this stage. Now, I think after the Act has been in effect maybe ten or twelve years, during the time, one needs to establish whether it is or not in compliance, need

*Colloquy*

not extend beyond—back beyond July 2nd, '65, but I think that at this stage, when the cases are being brought under Title 7, that they're being tried, that the Court needs this cross-section in order to make this determination.

The Court: I understand if you could show that this Company had a system of classifications—a classification that was discriminatory in June of '65, that I could assume from that, that they didn't correct it, by the effective date of this?

Mr. Belton: Your Honor, let me refer to the language at least in the Quarles opinion, which suggests that it's necessary to go back beyond the date—the question that is posed on Page 17 “is our present consequences of past discrimination covered by the Act?” Now, what the Court held in the Quarles case is that [102] as of January 1, 1966, Phillip Morris no longer discriminated. The Court also posed a problem, given a body of Negro problems, wherewith the Company prior to the effective date of the Act, who could not move—could not go into certain categories because of their race, are they denied benefit of Title 7? And this opinion says, “No,” and the Order is addressed only to those persons who were employed prior to January, 1966, when the Court found that they were no longer discriminated, and says something has to be done with this category of people. I'm saying, in this case we have the same situation here, because no Negroes have been employed with the Company since the effective date of the Act, and that you have had Negro employees with the Company extending back fifteen and twenty years, and they've always been

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in the category of Laborer, and that this is what we're trying to bring out and develop—this line.

The Court: Well, I will have to disagree with you with much respect, Mr. Belton, for your contention about it. I just simply cannot see how what transpired back of this time will help me decide whether after July 2nd, 1965, this Defendant discriminated or not. This suit was brought in October, of '66, some more than a year after this Act went into effect. Now, what [103] transpired back there until July of '65, is certainly, you know, important and pertinent, and if I start back of the effective date of the Act, there is no guide line as to how far you would go back. It just seems to me that it is like any other action,—that what happened on a different and separate time from the time that liability is talked about or responsibility is talked about—and I could be wrong about it—I want the record to show the exception of Counsel for the Plaintiffs, so that they can be protected in the event that I am in error, but this isn't a suit that started three days after the Act went into effect. This is a suit that started more than a year after the Act was effective. All right, you may proceed.

*By Mr. Belton:*

Q. Mr. Thies, do you have Answer #30 to the Interrogatories, which consists of the seniority list for the year 1966—1965, and 1967? A. Yes, I do.

Q. I think you testified that you have present qualifications for a High School education or an equivalency or successful—if you don't have the High School education or



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the equivalency, the successful passing of the Wonderlic and the Mechanical Exam? Is that correct? A. For what purpose?

Q. To be promoted from either Coal Handling or the [104] Laborer's category to other jobs—to other jobs in Dan River? A. He has to be promoted from Coal Handling Operator into the Operating or Maintenance jobs in the Power Station, or to be promoted from a Laborer semi-skilled into the Coal Handling Operations or the Watchman jobs.

Q. Referring to Answer #30 seniority lists for 1967, let me ask you if all of the employees listed under Control Operators, have a High School education or equivalency? A. I do not think they do,—no.

Q. Looking at the Answer, Mr. Thies, do you recognize the name of an employee in the Control Operator's category who has been frozen by virtue of his inability to move because he does not have the High School education equivalency? A. I don't have to look at the names. We don't freeze anybody in these classifications that have been in there for over ten years. When this policy was established, we didn't go back and pull these people out of a block ten years ago, when this policy was established—ten years ago or over ten years ago—I don't remember the exact date; we said, "All right, everybody that's in here that can 'cut the mustard' can go ahead and be promoted within their department, but nobody else moves into these jobs at the bottom unless they meet this new policy qualification, and that's the reason you all find all through this organization, and I told you about these two that don't have a High School education in the Pump [105] Operator classification. That is an example of what I'm talking about; here is two men that just can't progress, and they have voluntarily said,

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"We can't progress." Now, we have also had cases where a man would say, "I want to progress," and he'd get up there and we would have to tell him he couldn't do the job, but certainly you will find people all through our organization that don't have a High School education, because they've been in there for more than ten years—been in these departments for that long.

Q. Let me pose this question, Mr. Thies,—except for the Coal Handling—the Coal Handling Department and the Laborer's Department, if you will put those aside, if you will and let me pose the question,—looking at the seniority list which you have before you, do you recognize the name of any employee in any other department, who does not have a High School education, but who has demonstrated the ability to be promoted?

The Court: Let's wait a minute. Is that supposedly attached to this batch of papers?

Mr. Belton: I'm sorry, Your Honor. That is attached to Answer #30,—yes, it is.

The Court: While we are at this, Mr. Ferguson,—you and Mr. Belton—I saw you looking for this, supposedly thinking it was attached to this. Is there a copy of this attached to that?

【106】 Clerk Vaughn: Yes, there is.

The Court: All right.

The Witness: Mr. Belton, in answer to your question, I am not familiar from sight with who in this organization does or does not have a High School education. I could get my list out and look at them, but I am perfectly willing to admit to you that there are people without a High School education, who are in the Operating jobs, for instance, at Dan River,

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who have done a satisfactory job. I'm not denying that at all. I can't deny that because we certainly have them there who have done this job, who have been there for over ten years. I don't think there is anything magic about a High School education, but it was just something we felt years ago we had to start to get the kind of people that we needed, because the correlary to that is that we have had rather poor experience with some who did not have a High School education. It is a balance sort of thing.

*By Mr. Belton:*

Q. Let me ask this question. Since July 2nd, 1965, have you undertaken to determine the qualifications of Negroes in the Labor Department, who do not have a High School education, who do not have a High School equivalency, who have not taken either of the exams—have you undertaken to determine their ability for promotion out of [107] the Labor Department, independent of this criteria? A. We have not, as it would violate the policy that we have that a man must have a High School education to be considered for these higher jobs. We have not violated that policy. We took an interest in whether they could go on up or not to the extent that we talked with them and encouraged them to take these tests to find out. We encouraged them to go to school, and we would help pay for it. In fact, I even asked Mr. Knight to check in the community to find areas where they could get this training and to pass that information along to them to encourage them in any way we could to do this. We have not specifically given any sort of tests or made any sort of determination of what skills these individuals have who are not qualified under our present policy, to be considered.

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Q. Is it necessary for a person in the Laborer's Department who does not have a High School education or its equivalency to take—and he does not take advantage of the Company's program—my question is, is it necessary for him to take both the Wonderlic and the Mechanical to be considered for a promotion into jobs in Coal Handling? A. Yes, that's the policy we have set.

Q. I think you indicated, Mr. Thies, that you are beginning to get complicated machinery into the Plant just recently? [108] A. Well, over the whole Power System. See, I am looking over the whole System, too. The reason for this is the jobs even in Coal Handling, a man has to know how to operate diesel electric locomotives, to operate bull dozers and heavy machinery, and crushers and conveyor belts, and travelling trippers. It is a rather complex situation, even in Coal Handling, that he has got to be able to read, to understand orders, to read manuals, if you will, on how to do these things, to really be able to progress through Coal Handling satisfactorily. There is a need for more skilled people, that was felt over ten years ago. That's why we put this policy into effect.

Q. Realizing this need, Mr. Thies, how do you go about training your personnel for the various jobs in the Coal Handling Department, if you will? A. The principal means of doing this is while he is a Learner and also, after he has been promoted, he is given an opportunity to work in the various jobs in the Coal Handling under close supervision. To begin with, it is all explained to him. Generally, it would be categorized as "On The Job Training."

Q. Is this to say that you have a formalized training program? A. We have a training program, but it is not written out, as such.

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【109】 Q. I think you testified, Mr. Thies, that you do have several Negro foremen, who are working—who are doing work, not in the Department of Coal Handling, but who are doing work in the Coal Handling Department? Is that right? A. Not Negro foremen.

Q. Negro employees? A. Negro semi-skilled Laborers.

Q. All right. A. There are some semi-skilled Laborers who are normally assigned to clean up in Coal Handling, yes.

Q. Now, in the normal course of their work, would you know whether they would have an opportunity to observe the various jobs that have been performed by a person in Coal Handling? A. They would—they would of course be working around the Operators. They would be able to see what the Operator was doing. I think they would be able to observe what he was doing. Now, whether they know when he does it or why he does it, I don't know, but they could at least see his physical motions, yes.

Q. The opportunity would be extended for observation? Is that correct? A. Well, they are working around in Coal Handling, so to whatever extent they saw an Operator doing something, then, they would observe it, but there is no formal program 【110】 of the Laborers following an Operator around or anything of that kind.

Q. Now, let me ask you this. Would there be an opportunity for Laborers who are working with employees in the Maintenance Department to observe the jobs performed by personnel in that department? A. They don't normally work with Maintenance crews.

Q. Would they ever have the occasion to assist Maintenance Personnel? A. Well, to the extent that I described this morning where you might be working on a turbine and you would need somebody to take a wire brush and brush

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some threads out of the bolts or something of this kind, if you want to call that working with Maintenance people. They are on the same particular maintenance job, doing Laborer's work, but they don't work with the maintenance people, as such, no.

Q. Now, let me call your attention, back again, I should say, to Interrogatory #34, which lists—34A and B—which lists the overtime work by each employee since July 2nd, 1965? A. Yes, sir.

Q. I think you testified that you made an analysis of the percentage of overtime performed by persons in different departments? Is that correct? A. Yes, sir.

[111] Q. Did you make—in your analysis, did you make a determination of a total average of overtime work by white employees, as contrasted to the average—total average of overtime work by Negro employees? A. No, we did not, because we don't consider there's any difference. We don't make any distinction between our white and Negro employees. For instance, in the Coal Handling, we have got a Negro employee who is a Helper. He's a part of the Coal Handling Operation. We see no reason to pull him out of the Coal Handling Operation. He's a full part of it.

Q. So on the computation, of the overtime percentages, you included those Negro employees in Coal Handling in that computation? A. Let's not misunderstand. The only Negro employee in the Coal Handling Operating Department is the one who is classified as a Helper. The other—the other semi-skilled Laborers, who are in the general area of the Coal Handling Operation are in the general Labor force of the Plant, and they just clean up over there and occasionally drive a spike in the railroad or put some flash in bags or something of this kind, but they are not part of

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the Coal Handling, if you will. They are not a part of the Coal Handling Department as such.

Q. Thank you. [112] A. You see what I mean? O. K.

Q. Did you finish your answer, because I was trying to clarify a point that I was a little confused on? A. Maybe I misunderstood you.

Q. Let me rephrase it, if you will, so we can understand each other. My question is that you did make an analysis of how much overtime was worked by employees in a certain department? Is that correct? A. Right.

Q. Now, my question is, realizing that you have some semi-skilled Laborers who work—when I say, in the Coal Department, I don't mean that they are employed in Coal. Of course, they do work in the physical location? Is that correct? A. (No answer.)

Q. Did you compute the overtime that they worked, into the percentage worked by employees in Coal Handling? A. No, we did not. They're in the Labor Group.

Q. Mr. Thies, do you know whether the Company has conducted validation studies for the Wonderlic Exam? A. For what purpose?

Q. For validation purposes? A. Validation of—for what?

Q. Let me pose this question. Do you know what validation is? [113] A. Yes, I do.

Q. Would you explain to us in the Court what validation means? A. Validation means, whether the tests as being applied yield valid results that it is designed to achieve. Now, I am asking you. I don't understand your question. You say, have they been validated, and I say, "Validated for what?" Employment, promotion, or what? I don't know what you mean.

Q. Let me say, have they been validated for promotion

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purposes at Dan River? A. Tests are not required for promotion at Dan River.

Q. I'm not saying that they are required. I'm asking—you do have tests that you use at Dan River for promotion purposes? A. No. Not required for promotion purposes.

Q. I'm not saying that they are required. Let me see if I can get it this way, so maybe I can stop talking in circles. You indicated that if a person didn't have a High School education or equivalency, in order—and does not take advantage of the Company's Refund Tuition Program, that he could take both the Revised Beta and the Wonderlic? Is that correct? A. Yes, sir.

Q. Now, the purpose for which you give the Revised [114] Beta and the Wonderlic, is to determine his promotability? These are the factors— A. That's the Mechanical AA, I believe, isn't it?

Q. The Mechanical AA? A. And the Wonderlic.

Q. Yes. A. The purpose for this is that I have just said: All right, if you make the same score that anybody coming in the front door that asked for a job, makes, I will, so call, waive the High School education requirement, because this satisfies me, that you can do the job, that you have got enough basic intelligence level to do the job, and mechanical aptitude to do the job.

Q. My question now is, have the Wonderlic and Mechanical AA been validated for that purpose? A. There has been no attempt to make any validation of the use of these tests for this purpose. It's a good—in my opinion, it's a good bit lower requirement than a High School education, and I felt we were bending over backwards to accept this in lieu of the High School education, and no one has passed it, and there's been no opportunity to be any validation made of it because nobody has ever passed it and been pro-



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moted into a job. I wish they had. I would be interested in this, but I don't think it's really pertinent, but maybe you do. I made no attempt to make any [115] validation because we haven't had anybody that's passed it and gone into a higher classification.

The Court: I believe you said you only had had three?

The Witness: Yes, sir.

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[120b] • • •

Mr. Ferguson: The posture of this is now that the Plaintiffs' evidence, except its expert evidence, is in the record. The testimony of the expert is not. You realize as you indicated, that Mr. Thies testified out of turn?

The Court: Right.

Mr. Ferguson: Also, during the introduction of the Plaintiffs' Exhibits, His Honor allowed me to reserve the right to specifically object to answers to Interrogatories and depositions of the named Plaintiffs, as well as employees of the Defendant, Duke Power Company, and to put on evidence in connection therewith if I deem it necessary to amplify or explain away [121] inferences that might be drawn from that testimony. At this time, therefore, with respect to Exhibit 11, which is the Answer—the Answers to Interrogatories, and Exhibits 14 through 32, which are the depositions of the named Plaintiffs, as well as the depositions of the Company employees, the Defendant objects to all questions posed by the Plaintiffs and moves to strike all answers in response thereto, as they relate to

*Colloquy*

any Pre-Statute activity, that is prior to July the 2nd, 1965, on the ground that it is irrelevant and immaterial, and the Act is prospective and not retro-active in application.

I believe, His Honor, with respect to Exhibit 12, which was the Revised Beta Examination, placed the burden on Counsel for the Defendant, to move to expunge from the record, Exhibit 12, which is the Revised Beta Examination. At this time, in view of the fact that there's an expert in the field of testing who is coming on to be heard, I don't wish to make that motion, because it may or may not be prejudicial to the Plaintiffs, and I am not asking His Honor to rule on that at this time.

Further, the Plaintiffs have failed to show that any Negro has sought and been denied employment at the Dan River Steam Station, solely because of his race or [122] color, and accordingly, the class represented by the Plaintiffs are those Negroes who are employed at the Dan River Steam Station as well as those who may subsequently be employed and not those who are seeking employment, because there is absolutely no representative of that class. They haven't shown that anybody had sought and been denied employment solely because of race or color. Now, based on this, we further object to all questions in Exhibit 11 and Exhibits 14 through 32 as they relate to hiring, recruiting, interviewing, and in other words, anything other than promotion, though we contend this is a promotion case and not a hiring case. The employment practices drawn into this controversy are promotion practices and not hiring practices, and we move to strike all an-

*Colloquy*

swers in response to questions that attempt to elicit that sort of information.

The Court: All right, now let me catch up with my ruling.

Mr. Ferguson: All right, sir.

The Court: Now, on that, I overrule your objection, and deny your motion to strike. Now, on your objection and motion to strike, relative to Exhibits 11 and Exhibits 14 through 32, I understand that objection to be, that as to those depositions [123] and the Answer to Interrogatories that really you are saying to the Court that the Court should only consider them as they relate to happenings since the effective date of the Act, and in that, I have previously ruled that it is my opinion that you are correct in that, and therefore, I will sustain your objection as to the consideration of those exhibits as they effect the period prior to the effective date of the Act, and allow the motion to strike. Now, you say on Exhibit 12, you are not making any motion at this time?

Mr. Ferguson: Not at this time, no, sir.

The Court: All right, do you have anything further?

Mr. Ferguson: Nothing except to advise the Court that at this time we don't intend to call any witness other than our expert witness. We don't intend to amplify or explain away any of the depositions or Answers to Interrogatories, and we are hopeful that we can conclude this matter today.

The Court: All right, Mr. Belton.

Mr. Belton: Your Honor, I don't want to go back and re-argue the point concerning evidence pertain-

*Colloquy*

ing to Pre-Statutory activity. I think in context of the ruling at the time, a witness for the Defendant was on the stand, and I am wondering, in light of the [124] preservation of Plaintiffs' exception with respect to the Judge's ruling, the testimony would extend to the ruling with respect to the depositions as just raised by Counsel for the Defendant, in terms of the Pre-Statutory activity?

The Court: I don't quite understand you, Mr. Belton. Of course, once you're protected on the record,—and I wanted to show, as I think we had before, that you object to that ruling, of the Court, and I note your exception now. Does that take care of that?

Mr. Belton: That's right.

The Court: All right. Now, Mr. Belton, you had brought up the question as to whether you could put in this evidence, so that if the Court is in error, it would be before the Court. Now, it is of course abundantly clear in the Interrogatories and in the depositions,—the evidence that you say that I should consider. Now, that would be before the Court on an Appeal. I am not ruling—if you want to put on some evidence about what happened before, I am not ruling you out. I say, I am not going to consider it in making up my decision, and the reason is—the effective date of this is July, '65; isn't that right?

Mr. Belton: That is correct, Your Honor.

[125] The Court: All right, the suit was brought in October of '66. Now, I can see if it was something that transpired in August of '65, that what went on before July of '65, could very well be pertinent, but

*Colloquy*

to hear over a year,—there's about sixteen months, you know, between the time this suit was filed and when this Act went into effect, and it just seems to me, improper that we go back beyond the date that this complaint really points to—that there would be ample time in sixteen months. I mean, whatever violations that transpired, that period would be sufficiently pointed out. Now, you go ahead, in the light of that ruling, why, you can fix the record as you see fit.

Mr. Belton: Thank you. Just one other point on this, Your Honor. I do recall at the time Mr. Thies was testifying, I called to the attention of the Court, a question which was propounded to Mr. Thies, during the deposition, concerning whether or not the Defendant had engaged in a practice of limiting the employment opportunities of Negroes prior to the effective date of the Act, and I think if I recall correctly, that an objection was interposed at the time, and the Court sustained the objection. Now, this is one question that we've been trying to get at, both in depositions and we had sought to get it through the testimony of [126] Mr. Thies, but we haven't thus far, from addressing ourselves to that particular question.

Mr. Ferguson: Plaintiffs' word opposed, Your Honor. He had a perfect right to ask them that. Aren't they competent to testify about the circumstances and conditions under which they were employed? It seems to me they are.

The Court: Did you take Mr. Thies' deposition?

Mr. Belton: We did take his deposition, Your Honor, and that precise question I raised, was ad-

*Colloquy*

dressed to Mr. Thies, and Counsel for the Defendant instructed the witness not to answer the question.

Mr. Ferguson: That is the reason, Your Honor, for my objection. It is so hard in taking depositions and answering Interrogatories to predicate every question on—prior to July 2nd, 1965, and you're going to find when you get into reading these things that it is just all mixed up. It is just senseless, I believe, to object every time to every Interrogatory when you have a stipulation, with respect to the depositions, rather, that every question is deemed objected to, and every motion or every answer is deemed to be susceptible to a motion to strike. It just seems senseless to do that every time, and that is the exact reason for my motion that the Court strike all answers with respect to hiring [127] and hiring practices. This is a promotion case. They don't have any representative. The answer to Interrogatory 14 clearly shows that there were no job openings, and this is our evidence. There was no job opening at the Dan River Steam Station since July the 2nd, 1965.

Mr. Ferguson: And they have not shown—

The Court: Is Mr. Thies here?

Mr. Ferguson: No, sir.

Mr. Belton: Your Honor, if I might just be heard on this question,—now, Counsel for the Defendant has raised a question in light of Judge Stanley's ruling as to the class action. Now, we are aware of that ruling, but our position is this as to the evidence, that evidence as to employment practices is relevant to the promotion practices, assuming that we are limited to this issue in the case. Now, bringing in

*Colloquy*

evidence as to the employment does not subvert in any way the ruling of Judge Stanley as to the designation of the class, and we are bringing this evidence in—well, our position is that the class should include it—well, apart from that issue, our position is, evidence related to the employment practices of the Company, inasmuch as we allege the policy and practice of discrimination would have some bearing independent of [128] the question of employment on the promotion practice of the Company, and I thought—

The Court: All right. Put your evidence on, and you all object to it and I'll rule on it.

Mr. Belton: Your Honor, in order to try to proceed with the matter, pursuant to the Court's Memorandum of Tuesday, when the Court was advised of the unavailability of the named expert witness that we did have, the Court, I think, indicated that the case would be continued to 9:30 this morning, and at this time, we could call here, the name of the person we indicated to the Court or in lieu thereof, a person to complete our case, and at this time, in conformance with the Court's ruling, we'd like to call Dr. Richard Barrett. Dr. Barrett is being used in place of our witness that could not be here this morning.

The Court: You all object to that?

Mr. Ferguson: Yes, we object to it. I just want the record to show, Your Honor, that we were advised of the change in the expert witness on Wednesday of this week. This morning, I am advised that Mr. Belton intends to put on a 100-page study or to offer into evidence, a 100-page study made by Dr. Barrett, as principal investigator for NYU, and I'm

*Colloquy*

not saying at this time that we can't proceed with the matter, but [129] I do want the Court to be aware that depending on what he says,—we will just have to see what he says before we can proceed with this case,—even the cross examination of it.

The Court: I recognize that this is entirely contrary to our rules, and that you are entitled to have the name of the witness and generally what he is going to say, unless there is surprise, and the rules say that where a witness cannot attend and there's some change, that you will be apprised of that immediately. Even so, let the witness be sworn, and I'll allow him to testify.

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Whereupon, RICHARD S. BARRETT was duly sworn, and testified as follows:

*Direct Examination:*

The Court: Before Mr. Barrett starts testifying, I want to state this is my view of what you say with reference to my ruling, on your question of Mr. Thies. Now, I have stated that I do not think what happened prior to July, '65, is competent. Therefore, any decision that I make will be done, absent of whatever might be in the record on that. Therefore, if the situation should be—the decision should result, and there should be an appeal, and my decision should be [130] adverse to you and the Circuit Court says I am wrong about that, they would have to send it back to be considered, you know, at that time, why, I take it that the case could be opened for whatever testimony that you desire to put on in that re-



*Colloquy*

spect, to make the record reflect whatever evidence you had, including that of Mr. Thies or other that you wish, because I would then in the event that it should develop, why, as I said, it would have to be sent back for consideration of that evidence. Therefore, I don't see how the failure to let him answer that and put it in the record, would be prejudicial.

Mr. Chambers: Your Honor?

The Court: Yes.

Mr. Chambers: Your Honor, would that then,—would the Court's ruling—would that satisfy the Plaintiffs' responsibility to proffer the evidence to show what the witness would have said, because there are, as I recall, in the depositions, several other questions of witnesses who are instructed by Counsel for the Defendant, not to answer that specific question or questions, related to pre-Act activities, in view of the Court's ruling now, that if this matter is appealed, and the Court decides that these are proper inquiries, we could then put that on, and that would [131] satisfy our obligation,—now, to show what the testimony would have been, so if it comes back, we could put this evidence on, if the Court decides that this is a matter that should have been inquired into.

The Court: Let me think about that. Go ahead with this witness. I don't take it. I realize that it's what the witness would say in a case that is objected to,—not the question itself and that in most instances, it would be to put the answer in so that it could be considered. Whether that is the situation here or not—let's go ahead with this witness.

*Colloquy*

Mr. Ferguson: Your Honor, let me just make one comment,—then I will sit down. It seems to me like that at this late date, they're asking to put on this evidence, and this matter is coming down to be heard on the merits. Now aren't they under some obligation to move the Court to make some sort of motion to compel answers to those Interrogatories before we got here? They put it into evidence with the full knowledge that they had been directed not to answer these questions. That's their case—the results of their discovery procedure.

The Court: I'm not proposing to open up all those Interrogatories and let them develop that question. That's not what's concerning me now—is the question **[132]** they asked Mr. Thies.

Mr. Ferguson: Which is the same question which is in the Interrogatory, so he said.

The Court: But nevertheless, he was on the stand.

Mr. Ferguson: Yes, sir.

The Court: And that question was asked, and you objected to it, and I ruled on it.

Mr. Ferguson: Yes, sir.

The Court: Is Mr. Thies available?

Mr. Ferguson: No, sir; I could get him here, maybe late this afternoon, but I can't promise it. I don't know what his schedule is, frankly, Your Honor. That's one reason we want to get him on, Tuesday, to let him complete some other commitments he had today. We will undertake to try, Your Honor, if you want to put him on.

The Court: How about sending someone out there, and let's get this record in shape. You don't want to string them out indefinitely, and if the matter goes

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up, and the Circuit Court, you know, has a different view of it,—then we're back down here at the same old stand. Now, let me say with you gentlemen, let's get this thing to a conclusion. You just want to ask Mr. Thies that question, and you want that to go into the record. I wouldn't open it up now for a full-scale [133] examination of Mr. Thies. You want to ask him the question about the policies before the effective date of the Act. Is that it?

Mr. Belton: That is it, Your Honor. I would not think that we would want to develop more than fifteen minutes along this line; that is, just posing the question itself, would open the inquiry not entirely, but at least to give the Court some feel for the position that we think—

The Court: See if you can't get Mr. Thies here. All right. Let's go. Wait just a minute.

Mr. Ferguson: Your Honor, he can go ahead. I can listen with one ear.

The Court: All right.

*By Mr. Belton:*

Q. Would you state your name, please? A. Richard S. Barrett.

Q. Would you state your present occupation? A. I am a Consultant with Case and Company, New York City.

Q. And would you describe for the Court what Case and Company does? A. Case and Company is a firm of Management Consultants in the fields of Psychology, Sociology, Engineering, Management, Finances, and so forth.

Q. Now, would you state, Dr. Barrett, your educational [134] background? A. I received a Bachelor of Science in Administrative Engineering at Cornell University, 1948;

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a Master of Arts in Education from Syracuse University in 1951; a Dr. of Philosophy in Industrial Psychology from Western Reserve University in 1956.

Q. Would you describe for us—you said you did have a Ph.D. Is that correct? A. Right.

Q. Dr. Barrett, would you describe for us your work history? A. I started out in 1948 as an Industrial Engineer, for about a nine-month period and then decided to go back into the field of Psychology. I worked from 1951 to 1953 as a Professional Associate in Richardson, Bellows, Henry and Company, a firm of Psychological Consultants. I did some work as a graduate student from 1955 to 1958. I was the Vice-President of the Personnel Research and Development Corporation, a Psychological Consulting firm in Cleveland, Ohio, and my work included research contracts on selection with the Federal Government,—also on performance rating; from 1958 to 1965, I was Assistant and then Associate Professor of Management, Engineering and Psychology at New York University. During that time, I conducted some research in the area of Industrial Psychology, and I consulted on [135] selection problems with some Corporations in the New York City area, and in 1965, I moved to become Director of Materials Evaluation of Science Research Associates in Chicago. However, I retained a position with New York University as Research Associate Professor of Psychology, to be principle investigator of a study for the Ford Foundation, entitled "Differential Selection Among Applicants From Different Socioeconomic or Ethnic Backgrounds." That's it.

Q. Let me establish for the record, what is your profession? A. I am an Industrial Psychologist.

Q. And would you briefly describe for the Court what is involved in the profession of Industrial Psychology? A.

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Industrial Psychology includes the aspects of human performance in business, industry, government, military services—the area that I specialize in has to do with the study of larger numbers of people, developing for example, Selection Programs, Rating Programs, Attitude Surveys, and other instruments that are designed to elicit information about the functioning of people in general. In addition, I have taken part in work where I am concerned with the individual,—perhaps interviewing one person or two persons and writing a report about their qualifications for a specific job or working with an individual who needs some counselling or training in order to improve his performance on [136] the job.

Q. Do you belong to any Professional Societies? A. I am a member of the American Psychological Association. I have been a member of a number of Regional Groups of Colonial Eastern Psychological Association, Midwestern Psychological Association, New York State Sociological Association of which I was member of the Board of Directors. I was also President of a local Psychological Association in New York City.

Q. Have you had the occasion to publish any works? A. Yes. I have—one of them of course, being a report of the study on “Differential Selection Among Applicants From Different Socioeconomic or Ethnic Backgrounds.” I published an article in the Harvard Business Review on the election of minority groups. Prior to that, I had an article in the Harvard Business Review on testing in general, and a number of research publications in Industrial Psychology in general.

Q. Now, you listed one publication, I think, as the “Differential Selection Among Applicants From Different Socioeconomic or Ethnic Backgrounds”? A. Yes.

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Q. Would you list just several others? A. Well, let's see,—“Exploration in Job Satisfaction and Performance Rating,” “Performance Suitability in [137] Role Agreement,” (r-o-l-e) as a theatrical role, “Job Satisfaction,” “Job Performance,” and “Situational Characteristics,” “Comparison Programs and Conventional Instruction Methods,” and so on.

Q. In your profession as an Industrial Psychologist, Dr. Barrett, have you had the occasion to consider the Wonderlic Examination? A. Yes, I have.

Q. Have you had the occasion to consider the Mechanical “A” Examination? A. Yes.

Q. Have you had the occasion to consider the Revised Beta? A. Yes, to a lesser extent.

Q. Now, when I say “Consider,” would this be—would this fall within your area of specialization? A. Yes.

Mr. Belton: Your Honor, I offer Dr. Barrett as an expert witness on Tests and Measurements.

The Court: On what?

Mr. Belton: On Tests and Measurements.

The Court: Now, would you tell me what that is? He says he is an Industrial Psychologist. I've got to qualify him as an expert or I understand that I should, by Tests and Measurements, now—

[138] Mr. Belton: Might I address the question to Dr. Barrett, so that he can explain it to the Court, because it is technical?

Dr. Barrett, would you explain that to the Court?

The Witness: I think it's most appropriate to say that in this context, that I desire to be qualified as an expert in the use of Tests and other Selection Procedures for Employment or for Promotion and Upgrading.

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Mr. Ferguson: I wonder if I could get that repeated?

The Witness: As an expert in the use of Tests and other Selection Procedures for Selection and Promotion in Employment.

The Court: I am proposing—

Mr. Ferguson: I'd like to take him on Voir Dire for just a couple of questions, if I may?

The Court: I think you have a right to question him before I make any entry.

*Voir Dire**By Mr. Ferguson:*

Q. Mr. Barrett, I understood from your examination so far, that you are Consultant with Case and Company in New York? A. That's right.

Q. I noticed that when you mentioned the areas in which that firm consult, there was no mention of testing? [139] Is that true? A. Well, when I talked about the heterosciences in general, testing was included. I didn't mention it specifically, but that's one thing.

Q. All right, sir. Have you ever been employed in industry? A. As an employee,—not in Industrial Psychology, no.

Q. You've been an Industrial Engineer, but you've never been employed in industry as an Industrial Psychologist,—is that correct? A. That's right, except as a Consultant.

Q. Do you characterize yourself as an Educational Psychologist? A. I have, in the last two years, worked in the field of Education. My primary experience has been in Industrial Psychology.

Q. But you have never been employed as an Industrial Psychologist in industry? A. No, the work of Science asso-

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ciates—there's a little bit of work to do with Industrial Psychology, but not enough to, I think, be qualified.

Q. I believe you mentioned that you have considered the Wonderlic and the Bennett Mechanical "AA" Test, and you mentioned further that that falls within your area of study?

A. Yes.

**[140]** Q. What do you mean by that? A. I mean that the—I mean that these are tests that rather routinely come up in studying jobs. In my doctoral dissertation, for example, the Wonderlic Test had been used as one of the tests on which reports were based regarding selection, and in looking at any kind of selection procedure, you look at a number of instruments and decide which one is most appropriate. On occasion, I would look at the Wonderlic or at the Bennett "AA."

Mr. Ferguson: No further questions, Your Honor.

The Court: All right, let the record show that the Court finds this witness an expert in the use of Tests and other Selection Procedures for selection in Promotion in Employment, and that the Defendant objects and accepts to this ruling by the Court. All right.

*Re-Direct Examination by Mr. Belton:*

Q. Dr. Barrett, have you had the occasion to assist in determining in the selection of personnel for jobs? A. Yes, I have.

Q. Would you describe to the Court, Dr. Barrett, what you consider those criteria—you would consider in making a determination as to the selection process? A. The earliest step and one that continues throughout such a study, is to find out what the job requires. **[141]** It is



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typically done by interviewing incumbents on the job,—supervisors of incumbents on the job, or someone who for some reason may be expert in what the jobs require. It is determined what is done. Simultaneously, it is also determined what sorts of skills are required,—whether the job requires a given level of command of English, manual dexterity, numerical calculation, judgment, ability to lead people or whatever it may be. Once it's understood what the job requires, the next step is to look around among the existing selection procedures to find whatever ones are available that might be used to determine whether someone has these requirements or not, and on occasion, to develop procedures for this purpose, if none that are satisfactory exist. Once you are satisfied that you have procedures which fit the situation, as well as they can, from your basis of the knowledge of the situation and the knowledge of the instruments, the next step in the procedure, is to try them out, and the trial may take several steps. The first step and the simplest one, is simply to administer the test to a number of people who are like the ones that are going to be selected or promoted. The purpose of doing this is to find out how hard the test is for this particular group. The reason for doing that, is that it has been shown over and over again, that even though a job may look the same, the kinds of applicants who appear will depend upon the recruiting [142] procedures, the labor pool at that time, geographical location, the level of education, and so forth. So, it's possible to make an educated guess as to whether the tests will be hard or easy, or appropriate or inappropriate. It is always sound procedure to try it out and see. If, in fact, people can take the test satisfactorily, then the next procedure is to validate the test—that is, to try it out on

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people who are applicants or candidates for promotion, and to compare the test scores with their performance. Now, there are a number of ways of doing this, and I don't want to go into too much detail. One procedure is to take people who are new on the job, give them the test, develop some measure of their performance and compare the two. Another procedure is to give the test to a number of applicants, to accept them on the precision—perhaps not even using the test scores at this time in seeing how they work out on the job. There are a number of considerations in determining what is the standard performance that these people have achieved. One is whether a person has performed satisfactorily on the job for which he was employed. Another, is whether he performed satisfactorily over a period of time and progresses at a rate which is deemed satisfactory. Another possibility is simply to develop tests, the idea being to select those people who would stay on the job long enough so that the Company recoup its cost in putting them [143] on the job and training them, and so forth.

Q. Returning, if you will, to a consideration of job evaluation, would it be necessary to seek professional assistance in determining the job analysis? A. I think it is harder to find,—what professional assistance do you mean, —Industrial Psychologist as such, or some kind of professional person?

Q. Let me re-phrase the question. In trying to define the job description, what steps might be taken, if you would, in making this determination? A. Well, primarily, the best way to do it, are to 1. Get information directly, by interviewing people who are on the job, and to further interview supervisors of these people on the job so that you can arrive at some agreement between the supervisors

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and the incumbents as to what the job consists of. It is often important, if you have an important job, to interview everybody on the job, and everybody who supervises the job. In some cases, if there are a lot of people on a very similar job, it is appropriate to interview a sample of each. 2. Another technique is to observe the individuals on the job, and observation really doesn't mean too much unless the person already has some idea of what the job consists of, because you really don't know very often, when a person does something with his hands or makes some decision, how complicated it is without knowing [144] the background. So that is useful, but not as useful as the interviewing. It is also feasible, in many cases, to talk to someone that already knows the jobs intimately. For example, in my case, I have learned about jobs by talking to other Industrial Psychologists and employment people who have been working with these jobs and with these people for a long time, and this way, just getting information which is required, on the job.

Q. Would it be necessary in determining the job descriptions to reduce the job analysis description to writing?

A. I think it's a good practice, and it makes a useful record. I don't think it necessarily improves the quality of the work? It is not essential, no.

Q. Now, I think you spoke of a validation? A. Yes.

Q. I think at the time, you also attempted to define it for us? A. Yes.

Q. Would you in layman's terms, Dr. Barrett— A. O. K.

Q. Try to give the Court some appreciation of the term—by what is meant by validation? A. All right. Validation—a test of others' selection procedure is valid to the extent to which people who score high, perform well, and

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people who score low, perform [145] poorly. The validation is typically expressed in terms of a validity coefficient, which is a correlation coefficient, which compares in a systematic and mathematically sensible way, the predictor's scores—the interviews, the test scores or whatever the particular may be, with the scores that have been derived on the performance of the individual through performance rating,—through his progression through job categories, through the kind of raises he's gotten, and so forth; and there is a number of complexities—I don't know how far you want me to go into this—one of them is that you have to decide early in the game what it is you want to predict and why. For example, on a job that requires very little training, it may be desirable to get people who are going to do well on the job fairly fast. You don't care how long they stay. Another circumstance of the training is that it is expensive, and errors made in the training process are expensive. Maybe the appropriate criterion that you are trying to predict is how long a person stays on the job, and in many situations where a Company looks towards career employees, it is appropriate to use as a standard, how well they have progressed, and this requires considerable thought, because very likely, the test that predicts one will not predict the other.

Q. Let me show you, Dr. Barrett, Plaintiffs' Exhibit #11, which is the answers to Interrogatories. [146] A. O. K.

Q. I direct your attention to Question #22,—or answer to Question #22. A. O. K.

Q. For the record, Dr. Barrett, would you read what that record is, and for the benefit of the Court? A. You want the whole question?

Q. The answer. A. "In the Company's Steam Production Department, an employee must have a High School

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education or a certificate of completion of general education development, (GED) test, High School level, to be eligible for consideration for promotion from Watchman in Coal Handling Operator Classifications to other departments within the Station, and from the Laborer Classification to other departments within the Station. This requirement has been in existence for at least the past ten years. In order to give its employees in Coal Handling, Watchman, and Laborer Classifications without High School educations an opportunity to be considered for promotion to the higher-paying classifications, the Company provided that in lieu of the High School education, any person on its pay roll prior to September 1, 1965, who could pass the regular employment test, would be considered as having met the High School education requirement. This testing policy was designed to include, rather than exclude, [147] those employees without a High School education, who were employed prior to September, 1965, for consideration for promotion. In addition, employees without a High School education who did not desire to qualify for consideration for promotion through the testing procedure, were advised that they could take advantage of the Company's Tuition Refund Program in order to obtain a High School education. Thus, employees in the Coal Handling, Labor, or Watchman Classifications have three standardized non-discriminatory alternatives by which they can qualify for consideration for promotion. Neither alternative automatically qualifies an employee for promotion. In view of the foregoing explanation, Defendant is of the opinion that the tests are not per se a condition for promotion."—Do you want me to go on?

Q. No, we need not. Again, directing your attention to Plaintiffs' Exhibit #11, and specifically the answer given

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to Question #12, which is a relatively short answer, would you read that, Dr. Barrett? A. "12A: Job descriptions or summaries of duties required of each, were not previously reduced to writing, and are not in Company records, but such descriptions are reduced to writing solely for the purpose of answering this Interrogatory, (see attachments.)"—Shall I read B?

Q. No. A. O. K.

[148] Q. Assuming, Dr. Barrett, that tests were used on August 1st or instituted on August 1st, 1965, and assuming further that no job descriptions were available prior to that time, would you have an opinion as to whether this procedure would comport with that aspect of job evaluation which you indicated was a step in determining what criterion one would use for personnel's selection?

Mr. Ferguson: Objection.

The Court: Overruled.

The Witness: Provided that the information is not elsewhere available, I would say this is not good practice.

*By Mr. Belton:*

Q. Let me again refer you to Plaintiffs' Exhibit #11, and specifically to Question #22, which includes a copy of the Wonderlic and the Mechanical "AA." Do you have that? A. I don't have the test here,—or do I?

Q. I will give you this copy then. A. O. K.

Q. And at the same time, Dr. Barrett, referring you back again to Answer #22, given in the same Exhibit, in which is indicated that the cut-off score for the Wonderlic Examination as used at Duke Power, is 20, would you explain to the Court what that cut-off score means, and

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to assist you, let me show you the Manuals, both for the Wonderlic and [149] the Mechanical "AA," which have already been introduced into evidence. A. Well, the score by the "20" on the Wonderlic, is one that is typically achieved among High School graduates, according to one norm table, by—let's see, now, where is it—and there are a number of norm tables. This is a problem.

Q. Isn't that the answer to the question? A. Pardon? The answer is, of High School students' four years of training, about 42.8 per cent, will achieve 20 correct answers,—somewhat less than half. So, what else do you want?

Q. Now, let me put this question—and again, referring to Answer #12, in which it is indicated that there is a cut-off score, under some circumstances, of 39, for mechanical comprehension. Would you explain to the Court what that means? A. Well, a score of 39, according to the norm tables provided by the publisher, can be achieved by 65 per cent of applicants. For Mechanic's Helper, 55 per cent of the people who are applying for unskilled jobs; 45 per cent of the people who are candidates for lead-men jobs, and so forth,—it's about that level of difficulty.

Q. About 55 per cent? A. Well, yes,—depending upon the norm groups— [150] around 55 or 60 per cent.

Q. Would you describe to the Court, Dr. Barrett, what procedure is used in the field of testing measurements to determine what a Company will select as a cut-off score in the administration of tests?

Mr. Ferguson Objection.

The Court: Overruled.

The Witness: The typical procedure involves, 1. A study of the labor market, to have some general

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feel for the kind of people that can be expected to apply. Also, to note that the labor market changes, and that what changes in the labor market cut-off scores may necessarily change. Then, on the basis of trying the test out, if this is possible, to establish a cut-off score which will pass a sufficiently large pool of people, so that they can select enough people to keep their operation functional, and it is a matter of judgment and level of job and so forth, whether they are going to, from a given labor pool, want to get 50 per cent, 60 per cent, 30 per cent, or whatever—past this particular phase of the employment, so they can be considered on other bases as to whether they would be accepted. Now, the essential part of it however, is that these must be evaluated in terms of actual experience, with the tests, because this judgment is an [151] educated guess and it might be quite accurate and it may be inaccurate, and it is important to try it out and see how people actually perform.

*By Mr. Belton:*

Q. Now with respect to validation, Dr. Barrett, would you have an opinion as to whether validation of a test is an essential part in determining whether to use that particular test or not? A. Validation is something that I have always maintained is something that should be done where possible, and the "where possible" is the qualification that makes it difficult. It is not possible to validate a test unless there are enough people on similar jobs so that you can get some stability in your results. One swallow does not make a summer. You cannot determine whether a test works or not because of a predicted success on one



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or two people. There is no stated number that you have to have, but the more people you have, the more sure you are of your results, but if you don't have enough people, you simply can't do it.

Q. Assuming, Dr. Barrett, that an employer wanted to use the Wonderlic examination, in that that employer had less than 100 employees,—would you expect, or would you have an opinion as to whether a validation study should be conducted by that employer? A. I think I have to ask you to re-phrase the question because it really depends on how many people are on [152] jobs that are sufficiently similar, so that you can consider them as one group. It could be a manufacturer's representative organization with nothing but salesmen working for it, doing the same thing, or you could conceivably have 50 different jobs, and no more than 3 or 4 people on any one, so what is essential is the number of people on a job.

Q. Let me again refer you, Dr. Barrett, to Plaintiffs' Exhibit #11, Question #30—the answer to #30 which consists of the seniority at Duke Power for the years 1967, '66 and '65. A. O. K.

Q. Referring simply to the seniority list for 1967, and looking at the category of Control Operators, assuming that you had no more than that number of employees which consists of twelve employees— A. Yeah.

Q. And you wanted to use a test instrument for whatever skills are involved, would you expect a validation study to be conducted with respect to that category? A. I would think in the ordinary circumstances, on close examination you would find out that it wasn't going to be enough. For one thing, you are likely to have in this group, people of varying ages, and length of experience. The tests have different meanings for people of different ages,

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and that would be a very small number to use. What [153] you would probably find, on the basis of your study is that the tests don't work, when in fact, they may work, and they would prove it if you'd use a lot more cases.

Q. Again, referring to that list, Dr. Barrett in the category of the job description called, Coal Handling Operators,—assuming that you had no more than 10 employees in that category and you wanted to use a test instrument for the selection of employees for this category, would you expect a validation study to be conducted? A. Not counting the Learner, there's, let's see—1, 2—

Q. Well, counting the Learner— A. Well, there's 10 people altogether. I would say, that's not enough.

Q. Now, let me direct your attention, Dr. Barrett, if you would, to answer to Interrogatory #8, which is part of Exhibit #11. Assuming, Dr. Barrett, that in the total operation of a Company, that the total number of employees consisted of approximately 7,000 employees, and further assuming that of this number, approximately 1,000 were in the category of Coal Handlers;—would you expect a validation study to be conducted? A. I would expect—

Mr. Ferguson: Just a minute, please, sir. I don't see what reference this has at all. Maybe I just don't [154] understand the question.

The Court: Overruled.

The Witness: Well, the point is that looking at these raw figures and not knowing the detail about the nature of the Plants and the labor force, and so forth, there is an excellent opportunity to conduct a meaningful validation study and that it would be good business practice to do so.

The Court: Mr. Belton, I hope you won't get

*Colloquy*

too far afield in this examination. Some of these questions—you know, are a little bit foreign.

Mr. Belton: As I explained to the Court, Your Honor, I think it's necessary for the edification of Counsel and the Court, since we are under Title 7, that it is a major issue, and the question of validation does play a role in it. We designed these questions to try to give some light on just what the whole concept is.

The Court: I understand your contention.

Mr. Belton: —Assuming, Dr. Barrett, my last question, that a Company had a total enrollment of 7,000—approximately 7,000 employees, and of this 7,000, approximately 1,000 were in the category of Control Operator. Would you expect a Company to conduct a validation study?

Mr. Ferguson: Objection. There's no—objection. [155] There's no evidence that there are a 1,000 Control Operators in this case.

Mr. Belton: If I might be heard, Your Honor, an answer to Question #8, the Company did indicate the total enrollment of its entire system. We realize that the particular facility involved is the Dan River Steam Station, which has less than 100 employees, and what we are trying to show the Court is that the system could admit validation studies, and the institution of the tests which we are challenging.

Mr. Ferguson: My point is just this, Your Honor, he's assuming all sorts of facts that are not in evidence—these hypothetical questions.

The Court: You state your objection each time. Overruled. I think he, in a measure—that they are

*Colloquy*

correct; that your question assumes much. Overruled,—proceed.

The Witness: Let me answer. I would say that it is good practice. There are people who do not engage in good practice. I cannot say what I would expect. I think that is what should be done from a number of points of view. One of them is sheer economics. Probably they can make money or save money by doing a better job of selection, if they have that many people in one category.

**[156]** Mr. Belton: At this time, Your Honor, we would like to introduce into evidence—have identified and introduce into evidence, Plaintiffs' Exhibit #33, which is the Guideline of Employment Test Procedures by the—issued by the Equal Employment Opportunity Commission.

Mr. Ferguson: I have objection to that, Your Honor. I'd like to be heard on that.

The Court: All right.

Mr. Ferguson: May I be heard on it?

The Court: Yes.

Mr. Ferguson: Your Honor, this Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission, contains as a portion of it, a report by a panel of psychologists, none of whom has been cross examined in this matter. The qualifications aren't stated. It is replete with hearsay and opinion evidence. It is not competent. That is the report on the last pages—5, 6, 7, and 8. Now with respect to the Guidelines which are Pages 2, 3, and 4, I would have this to say—the test procedure that is becoming the controversy in this case, was insti-

*Colloquy*

tuted sometime in September of 1965. These Guidelines were published August the 24th, 1966. The complaint was filed October the 20th, 1966. Now in [157] view of all that, I don't see how this has any relevance to our intention of discriminating, if that is so, which we deny,—how this has any relevance on that issue whatsoever. When we adopted this test procedure, this document wasn't even a wink in the eye of the Chairman of the EEOC.

The Court: I would think you would be right, ordinarily, Mr. Ferguson, but I continue to be astonished at the rulings about matters of this type. It is contrary to my understanding of the rules of evidence, but I frankly do not understand why it would be competent either, but I should imagine that there has been established something, about the introduction of this.

Mr. Belton: If the Court please, Title 7 sets up the Equal Employment Opportunity Commission, which has the initial responsibility for determining whether an employee is engaged in an act prohibited by that Statute. Included in the Statute is a provision that it is not unlawful for an employee to act on a professionally developed test. The agency which has been given the responsibility for administering the Statute in response to questions addressed by a number of employees, has attempted to set up guidelines on testing, to guide employers in the use of tests as a selection [158] process. Again, I might say that Counsel for the Company argues that the guidelines were issued after the Company instituted its battery of tests, but in the same sense where the Legislature said you may, in

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private discrimination and in private industry, discriminate up to 1965, you can no longer do it; so to the extent that these guidelines have a bearing on the practice of the Company in making a determination as to whether they are acceptable or not acceptable, the fact that they were published after the Company instituted this practice, is not controlling.

The Court: Have you marked it? Is it marked?  
Clerk Vaughn: It's Exhibit 33.

The Court: Let the record show that the Court receives into the evidence, Plaintiffs' Exhibit 33, and that the Defendant objects and accepts to the Court's ruling.

(Plaintiffs' Exhibit #33, was identified and received into evidence.)

*By Mr. Belton:*

Q. Dr. Barrett, I show you Plaintiffs' Exhibit #33, and ask you if you are familiar with that document? A. Yes, I am.

Q. Directing your attention to Page 2 of that Exhibit, Paragraph 1, in which the statement concerning—well, the [159] first Paragraph, if you would. I would also like to ask you, Dr. Barrett, are you familiar or have you read Title 7 of the Civil Rights Act of '64 concerning employment? A. Yes.

Q. Are you familiar with the use of the word, "Professionally Developed Test" as used in that Statute? A. I couldn't pass the test on it.

Q. You could not pass the test on it? A. I don't remember exactly how it was used.

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Q. My question is, Dr. Barrett, would there be anything in the field of tests and measurements which would be comparable to—let me re-phrase the question. Would the standards used in the field of test and measurement and the use and selection and selection and use of tests be comparable to a professionally developed test?

The Court: He said he did not know how that was used, Mr. Belton. Wait just a minute now. He said he didn't know about it, and now, we're going to develop that?

Mr. Belton: Your Honor, I thought he said he couldn't recall it from the Statute itself, but he was familiar with the document that he does have in which the same language is used.

The Court: Sustained.

*By Mr. Belton:*

Q. I have several more questions, [160] Dr. Barrett. In considering the process of validation of any test used in the selection of personnel, would you have an opinion as to whether the race of the testee should be considered? A. Would you state that again, please?

Q. I'm saying, in the validation process, or the selection process of a test, would you have an opinion as to whether the race of the testees should be considered? A. Speaking solely from the point of view of—solely from the professionally scientific aspects of the question, I believe that our study—the Ford Foundation study referred to before and other studies, indicate that test scores achieved by people of widely different socio and ethnic backgrounds do not predict in the same way for members of these

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different groups, and that therefore, in order to develop a procedure which will assist in selecting qualified and satisfactory employees, it is desirable to consider major sub-groups independently, where it is possible to do so.

Mr. Belton: Your Honor, we would like to introduce at this time, Plaintiffs' Exhibit #34, which is a Differential Selection among applicants from different socioeconomic backgrounds, in which Dr. Barrett was a principal investigator for the study. Now, we did not list this document on the Final Pre-Trial Order because at the time, we were not aware of its existence, [161] and with that, we would like to introduce it as Plaintiffs' Exhibit #34, which bears on the question to which Dr. Barrett just addressed himself.

Mr. Ferguson: May it please the Court, we of course, object to the introduction of that on the ground that Mr. Belton has already stated, on the further ground that there has been no establishment that Dr. Barrett has his working papers with him—the basis of whether the sampling was done statistically or random sample. We just all of a sudden have this record burdened with a 100-page document which entitled, at least to be a sociological treatise, and it doesn't have any bearing on the issue in this case, in my opinion, as to the professional test. I think it is irrelevant and immaterial.

The Court: Are you people really insisting that this document is competent evidence in this situation, and do you genuinely and sincerely think that that is competent for a Court to consider, the way this is? Now, you are a lawyer. Now, tell me.



*Colloquy*

Mr. Belton: Yes, Your Honor. A short answer—

The Court: Tell me just why.

Mr. Belton: Because, Your Honor, I think—

The Court: There's been no foundation for it. You just bring it in here and say, "Here it is," now.

**[162]** Mr. Belton: That I can do, Your Honor. I can lay the foundation for it, and then, I can go on and address myself to your question.

The Court: To say nothing about a strict violation of the rule, that they haven't had an opportunity to see it, and of course, you would have a right to be up in arms, if they arrived here with a document for you, this morning, the first time—of how many pages?—to look through, and I frankly doubt that just on that basis alone, you know,—how can they cross examine him about it? Here, they are faced with it at whatever time that it was given this morning, and here in a short while, I expect to turn Dr. Barrett over to them for cross examination about what, about that document? They haven't had an opportunity to see it.

Mr. Belton: First of all, Your Honor, I would like to put it in and then address myself to the question. I would like to have it identified as Plaintiffs' Exhibit #34.

Mr. Ferguson: Now, one minute, if you please, Your Honor. Of course, Your Honor is going to rule on the admissibility of this evidence, but I might comment that at this point, that he is not qualified. You can accept him as an expert in the field of Tests and Measurements of something like that, and he can give his **[163]** opinion on these matters.

*Colloquy*

He can give his opinion as to the results of his study, but we still rather strenuously object to it. As a matter of fact, after we learned that Dr. Barrett was coming, I have one page, myself—just one short page that I want to introduce into evidence that they haven't seen yet, but it's nothing crucial, and it doesn't involve a 100 pages, like this thing does.

The Court: Well, Gentlemen, you mark it. I'm not going to allow that introduced, but mark it, so that you will be protected.

(Plaintiffs' Exhibit #34 was marked for identification.)

Mr. Chambers: May I make one comment, Your Honor.

The Court: Yes.

Mr. Chambers: We would concur with the Court that this matter was just brought to the attention of Counsel for the Defendant, and in all fairness to them and in terms of their cross examination, the matter might have been listed in the Final Pre-Trial Conference report or Order. However, the Court does permit one of Counsel to bring in an additional exhibit, if it comes to the attention of Counsel, subsequent to the Final Pre-Trial Conference. It is my understanding that this matter was brought to our attention on [164] Wednesday of this week, after the Court directed that we be here with the witness, if we wanted to present one on Friday, and at that time, we were unable to get it to Mr. Ferguson before this morning. However, I can also appreciate the Court's question of the

*Colloquy*

admissibility of this document on the other basis, but I would submit that it could be submitted as corroborative evidence, if for no other purpose.

The Court: Mr. Chambers, now in effect—you've got to remember that the shoe is on this foot now, but it could be running the other way, and to allow that—a 100-page document at this juncture, in effect, whomever it is admitted against is denied cross examination—

Mr. Chambers: That's correct, Your Honor, we would not be offering it then as direct evidence upon which the Court would draw, to form the opinion that the Court might render, but solely as corroborative evidence to what the witness might testify.

The Court: To the extent that it does corroborate?

Mr. Chambers: To the extent that it does corroborate, and on that basis, we submit that it would be—

The Court: Is this the report that you assisted in making? Is that right?

The Witness: The study was conducted under my [165] direction as principal investigator and the actual writing was done by other members of the staff. However, I went over the report, made changes and recommendations for corrections before it was put in this form.

The Court: All right. Mark it, "Plaintiffs' Exhibit #34" and the Court receives it into the evidence for consideration, only to the extent that it corroborates the testimony of Mr. Barrett, and for none other. The Defendant objects to this rule by the Court, and excepts. All right.

(Plaintiffs' Exhibit #34 was received into evidence.)

*Richard S. Barrett—for Plaintiff—Redirect*

How about Mr. Thies? Have you been able to get him?

Mr. Ferguson: I was just conferring with Mr. Ward.

Mr. Ward: If Your Honor, please, he had a meeting of District Superintendents, and so forth—he had his day filled up. I told him—I took the liberty of telling him to finish his meeting of District Superintendents—to call me, so we'd know when he'd be here, and he expected to finish by 11:30. I hope I didn't say the wrong thing, but I thought that these experts would be here for some little time.

The Court: I hope that we can get him the first [166] thing in the afternoon.

Mr. Ward: He said he'd do it by 2:00 or 3:00 o'clock.

The Court: All right.

*By Mr. Belton:*

Q. Just one or two more questions. I now show you, Dr. Barrett, Plaintiffs' Exhibit #34. I ask you if you have seen a copy of that document before? A. I have.

Q. Did you assist in the preparation of the document? A. Yes, I did.

Q. Would you explain to the Court, Dr. Barrett, how this report came about? A. The Ford Foundation, responding to a proposal that I made when I was on the Faculty at NYU, gave a grant to NYU to conduct a study on the differential effects of selection procedures, depending on the minority groups that are involved. There had, at that time, been one previous study of which we were aware, in which it was found that tests from poll booth

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collectors would predict success among negroes and not among whites, and in other tests, might predict among whites and not among negroes. This was a small study, and it included a course on the one-job category in the universe of all the job categories in the country so our proposal really was to extend this as far as we could and so, we went to organizations that met some standards [167] that we had set up. One was, that they had available preemployment test results in their files on people who are now in their employ; Two, that they had or could get some criterion measures—some performance standard measure on these people; and Three, that there were enough people of at least two ethnic groups to make it possible to compare the performance on the test and the performance on the job or each group independently and see if the test worked the same for both groups.

Q. Did you participate in their preparation of that?

A. I developed the proposal, and I helped develop the specific research design which was then carried out, primarily by Dr. Kirkpatrick and some graduate assistants.

Q. Would you briefly explain the methodology for compiling the report? A. Well, we went to the cooperating organizations. We identified the people and the job category by race. We obtained description of the kind of work that was done, the kind of work, the performance standards that were expected. We then collected test results, and we collected, of course, the performance results, and we analyzed these statistically for the separate groups to see how the test functioned.

Q. Now, did you participate in the writing of the report?

[168] A. The drafts of the report were written by Drs. Kirkpatrick and Ewen, and I edited these comments sometimes, and sometimes in a small extent and sometimes fairly extensive but I passed over everything.

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Q. Did other persons assist you in making this report?

A. Yes, Professor Katzell.

Q. Would you identify him? A. He's the head of the New York University Department of Psychology—also took an active part in the design and conduct of the study, and he read all these reports, and depending upon the circumstances, the representatives of the cooperating organizations read and made comments on the reports.

Q. Were there other persons besides Dr. Kirkpatrick who participated in its preparation? A. Dr. Ewen,—I believe that's E-w-e-n,—and they don't know the extent to which the graduate assistants,—Mr. Greenhaus, Mr. Gavin, and Mr. Cohen, who participated in the actual writing.

The Court: Anything further of this question?

Mr. Belton: Just one or two more questions, Your Honor. I should be through in about five minutes.

The Court: All right. All right.

*By Mr. Belton:*

Q. Dr. Barrett, would you state why the report was undertaken? **[169]** A. Simply concerned with this as a social issue and also as a scientific issue.

Q. Now, let me put the question once again. In the consideration of the validation of tests, do you have an opinion as to whether race played a part in the validation?

Mr. Ferguson: Objection.

The Court: Hasn't he answered that before?

The Witness: Yes.

Mr. Ferguson: Yes.

The Court: His answer was, "Yes."

The Witness: That's right, yes.

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The Court: All right.

Mr. Belton: No further questions.

The Court: All right, you may come down, Dr. Barrett, for a moment.

(Witness excused.)

You might want to take your documents with you. We will take an undeclared recess for a short time.

(Undeclared recess was taken.)

The Court: All right, Dr. Barrett is with the Defendant for cross examination.

*Cross Examination by Mr. Ferguson:*

Q. Dr. Barrett, this study that was introduced and received into evidence as Plaintiffs' Exhibit #34—as far as it's concerned, you don't know whether Duke [170] Power Company gave any consideration to different Socioeconomic or Ethnic backgrounds as far as these tests were in use or concerned, do you? A. I don't know.

Q. As far as Duke Power was concerned, your study really has no relevance whatsoever to the tests and use at Duke, do they?—As far as Duke Power Company is concerned? A. Well as far as what I know about Duke Power Company is concerned, I would agree.

Q. It's true, is it not, Dr. Barrett, that you get as many differing variations with respect to—within groups, such as a group of white employees, as you would in a group of negro employees, or minority employees, do you not? A. I don't know what you mean by "differing variation."

Q. I mean, supposing you were examining a group of white employees. Differences within that group can be very big too, can't they? A. Yes. You mean, differences in their abilities? Is that what you're talking about?

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Q. Yes. A. Yes.

Q. I believe, Dr. Barrett, you stated that validation was essential where it was possible? Is that right or best? A. "Essential" is a very strong word to use. I think that organizations can and will function without validation [171] where it is possible to have true validation.

Q. I believe you wrote an article in this last Harvard Business Review, did you not, Dr. Barrett? A. I did.

Q. January-February, 1968 issue? A. Yes.

Q. I'll ask you if in that you didn't state that tests for probably one job out of twenty can be adequately validated? A. One job out of twenty adequately validated for two different Ethnic groups, that I'm talking about. If you are not concerned with that, there are many more circumstances where you can do it, yes.

Q. All right, sir, I'll ask you if you didn't make this statement in the article? "While testing the ability, the tests present employees with difficult problems. Their importance in Fair Employment perhaps has been overrated." Didn't you make that statement? A. Yes.

Q. Didn't you go further and say, "There are many easier ways to discriminate, if the employer is so inclined"? A. Yes.

Q. Didn't you indicate in this article that this business of testing presents a particularly tough problem? A. Yes, it does.

[172] Q. And as a matter of fact, the title of your article is "Gray Areas In Black and White Testing," is it not? A. Yes,—yes it is.

Q. And I believe you made this statement, did you not,—"It is often assumed if Negro applicants score lower than whites, the test may be unfair, but this is not necessarily the case. If the low-scoring Negroes are also ineffective



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workers because of poor education or the debilitating effects of discrimination,—it is not the tests that are unfair. It is the society"? A. Yes.

Q. That "the test merely reflects society's unfairness"? A. That's right.

Q. Now, I believe, Dr. Barrett, you stated on your Direct Examination that validation was a matter of judgment and that the procedure to be used, or used to determine what a Company would do to select a test, would include a study of the labor market, to have some feel as to the type of people that will apply for jobs, and so forth? A. Yes.

Q. You stated, did you not, that this job evaluation should be done in terms, or this test evaluation should be done, in terms of skills on the job? A. Yes.

Q. The skills required by the job? [173] A. Yes.

Q. You're not telling this Court, are you, Dr. Barrett, that that's the only way to validate a test, are you? A. What's the only way to validate a test?

Q. By job related-ness? A. No, I went through a series of steps in which this is important, and how it is possible to ask people questions which on the surface, may seem nonsensical and have it turn out that they are valid predictors. This can happen—it's a reflection of a lack of thorough knowledge of human performance.

Q. And there are other types of validation, are there not? There is content validity and there is criterion and concurrent validity, is there not? A. Well, the terms are—that I think that you are getting close to is "Predictive ability."

Q. And "concurrent"? A. And "concurrent." These are the same sort of thing except for the time, plus "content validity." These are easily recognized terms, yes.

Q. Well, sir, a test, I suppose, you would say, should

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have two qualities: one would be reliability and the other one would be validity? A. Yes.

Q. Reliability means, does it not, Dr. Barrett, [174] that it consistently measures today what it measured yesterday?

A. Without getting into a long discourse on reliability, that's essentially correct.

Q. And validity means that it is valid for the purpose for which you are using it, doesn't it? A. That's right.

Q. And I believe, in reading your answer, or the answer to Interrogatory #22, you stated that—or that answer stated which you read into the record, said that, "Duke Power Company uses these tests or minimum acceptable scores on these tests, as a substitute or in lieu of a High School education"? A. Yes.

Q. So that's the aim of the test, is it not? A. I do not know what the aim of the test is, from having read that statement.

Q. Well, the statement said, did it not, that the purpose of accepting minimum acceptable scores on the tests, was to accept that in lieu of a High School education? A. Yeah, but it also made other statements.

Q. And the tuition refund? A. It's not the aim of the test, as far as that answer you read. As far as that goes, yes; the aim of the test was to make it possible for people to move ahead without [175] the High School equivalent.

Q. Now, you're a member of the American Psychological Association, I take it? A. That's right.

Q. Would you agree with this statement, that validity information indicates the degree to which the test is capable of achieving certain aims? A. Yes.

Q. And the aim that we are—that Duke is using these tests for, is a substitute for a High School Education,—isn't that correct? A. That's an aim. What the objectives

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of the Duke Power Company are, is something I do not know.

Mr. Chambers: Objection.

The Court: Overruled.

The Witness: I testified before as to what that statement said. I do not know what was on the minds of Duke Power Company.

*By Mr. Ferguson:*

Q. Now, you talked about job-related validity, did you not? You said that was the proper way to follow the test, did you not? Or one of the ways? A. No, you're using tests which I am not quite sure what you mean—job-related validity?

Q. Yes, sir. That's one way to validate tests—by taking the test score and correlating that with the [176] performance on the job? A. All right. O.K. That's it, yes.

Q. Now, when you take the test score, that is a factor that's ministerial? You see your test score, and you know what it is? A. Yeah.

Q. The other aspect of job-related validity, is performance on the job, is it not? A. Yes.

Q. So, job performance—rating of job performance depends, does it not, on the subjective interpretation of an employee's supervisor as to his experience on the job or as to his productivity or performance on the job? A. With relatively few exceptions, that's correct.

Q. And if there are 5,000 supervisors, you might get 5,000 different interpretations, mightn't you? A. Well, different—whether the difference in their interpretation is pertinent or not. Here, you get 5,000 people looking at any one thing, you're going to get 5,000 different things because

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they're made up differently, neurologically in their experience and everything else. But that won't mean that there may not be commonality in the things that they observe and report.

Q. Each employer faces the situation that is unique in his own area, does he not? **[177]** A. Again, how unique is unique? There's a great deal of commonality and there are also unique features in the workaday world. So that can only be answered—I don't think you intend me to do—it's in great detail. You'd say, "What is common", and "What is not common"? It is not unique? You cannot say they're unique because there're very similar things going on.

Q. What I am getting at is the statement that you made in your article again. I believe it goes like this, "Since each employer faces a situation that is in some respects unique, he and he alone is in a position to develop and invalidate tests and other selection procedures which will help him to hire from the available labor force, the best employees, regardless of race? A. Yeah. He may hire someone to do it, yeah.

Q. Are you familiar with the job duties at Dan River? A. I have read over a part of the deposition which consisted of job descriptions, on the hourly employees and supervisors.

Q. And you've never been up there and seen what they do? A. No.

Q. You don't know how the test is administered—scored, or acted upon, as far as Duke Power is concerned, do you? **[178]** A. I read a deposition by a man who gave some of the tests, and that's all I know about it.

Q. That's all you know about it? You can't describe the facilities where the tests are given or how they're admin-

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istered as far as Duke Power Company is concerned, can you? A. Except just what I learned from the deposition.

Q. Now, Dr. Barrett, the title of your study indicates that there should be some sort of separate treatment for Negroes or minority groups and whites, as far as testing is concerned? A. This is possible. You don't know whether this is true until you try it out. It exists in some cases.

Q. Well, I believe you say in your article, that when everything else fails, the only thing left to do is to grant Negroes special treatment? A. This, I say, is something that should be considered. I do not feel that it is something that is legal or even a moral obligation of a given employer, although people do it, and I think it's appropriate that they should do it.

Q. Even though that means one or two things, doesn't it? Either giving them special treatment or accepting poor performance on the job by minority groups? Isn't that what it means? A. Well, this special treatment may simply be the [179] appropriate training. It may be different job duties—different job classifications, and there are Companies, and I recognize that this is true, who do accept poor performance on the part of people because of racial background, and so forth. This is done.

Q. And that comes under attack from supervisors who are held accountable for the work as well as members of the majority group, who see other people getting by with less than what they get by with, and their work would be unacceptable, wouldn't it? A. This is one of the dangers of this policy, and it is a good reason why it should be recommended only under special circumstances—under control, and to make sure it doesn't get out of hand.

Q. Dr. Barrett, do you suggest—are you suggesting different norms for different races? A. Based on the evi-

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dence that I am familiar with,—in this procedure, in using different norms on the tests, may lead to the selection of people from the minority and majority groups, who are in total more effective than if the same norms are used. Now, the answer is "Yes."

Q. All right, sir, assuming that the same test is used, then, that would necessarily mean you'd have to adopt separate scores, wouldn't it? A. Yes.

[180] Q. And wouldn't that affect the whites who may have the same mental ability levels as negro, and it would work discrimination in reverse? A. The intent of the test is not to have them exist—the intent of the test is to select people who will perform adequately on the job. The issue then is not whether they score high or low on the test; the issue is whether they perform satisfactorily on the job, if it is possible by some adjustment of the scores for one group to get just as good performance from members of that group, and this does not discriminate against the whites at all or the majority or whatever other group we're talking about.

Q. Well, it would affect whites in their own group; wouldn't it? A. I don't see why. What you really are predicting is the performance on the job, and you get the top people, both white and negro, but you get them by different means, and that the accepted level of performance in both groups is essentially the same, and this does not adversely affect any one group.

Q. Isn't it true that whites in the North and Northeast and Mid-west go higher on tests than the whites in the South? A. Yes.

Q. Isn't it a fact that it's difficult for industry [181] to operate on different standards? A. Well, maybe. I don't think it's difficult. It's a matter of, everything you do,

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costs, and if the cost is worth it, why, you should do it. If it doesn't, it isn't worth it; you shouldn't do it.

Q. Well, sir, isn't the answer that minorities should raise their standards, because industry can't afford to relinquish their standards in the competitive world of today, can they?

Mr. Chambers: We object to that, Judge.

The Court: Sustained.

Mr. Ferguson: I may have just one more question.

The Court: All right.

Mr. Ferguson: I believe that's all, Dr. Barrett. Thank you, sir.

The Court: All right, come down.

(Witness excused.)

Is there any further evidence for the Plaintiffs?

Mr. Belton: Nothing further, Your Honor.

The Court: Have you had a report on Mr. Thies, recently?

Mr. Ward: Yes, Your Honor. He said that he was getting underway in just a few minutes, and this was during the recess, and he will be here by 2:30, I'm sure.

The Court: All right.

[182] Mr. Ward: It takes two good hours to drive it, to come into Greensboro. It takes about that long.

The Court: Let's see, he has to come from Draper?

Mr. Ferguson: No, sir, he's from Charlotte.

The Court: I regret that I felt the need to do that, but I believe maybe to get this record in the

*Colloquy*

shape, it would be proper that perhaps we should have him answer that question.

You people have simply objected to this evidence that is prior to the July date. I don' tknow whether that was a perfunctory objection or not. If the Court should be wrong in that, why, maybe we are wasting some time here. Do you people genuinely think that that is improper evidence?

Mr. Ferguson: Well, Your Honor, it depends on the context in which you are looking at it. It seems to me that any act which occurred before the effective date of the Act, which was legal to admit that, has shown that the same act is now illegal—just doesn't hold water. Then you assume that something occurred before the Act, all of a sudden, on July the 2nd, 1965, matured into a full-bloom cause of action?

The Court: I agree with you. We had a suit,—Mr. Chambers, you were in,—and I sustained an objection about one of your experts over there, and later, [183] I thought sincerely that it was not competent, but after we closed the evidence, I don't don't know what happened to the other side, but they wrote me stipulating that the testimony would come in, you know. I didn't know that this was a matter that you people were just perfunctorily objecting to, and it's obvious to me that you have a genuine feeling about it, and that you think it is incompetent, and I agree with you.

Mr. Ferguson: I just don't think it has any probative value, Your Honor, and I think it is entirely within the trial Judge's discretion.



*Colloquy*

The Court: Of course, you know that in some of these teacher's suits and so forth, that they have allowed and considered discriminatory practices that have occurred before, to go into those suits.

Mr. Ferguson: I have an argument for that.

The Court: What is your argument about that?

Mr. Ferguson: Your Honor, there you're talking about a controversion of the 14th Amendment which says no State shall—and this is a private action, not the action of any governmental agency.

The Court: Well, we won't argue that point. I am sure the Circuit Court will let me know if I'm wrong. They usually do.

Mr. Chambers: Your Honor, might I make one [184] inquiry about the Court's ruling? Is it the Court's ruling that no act of a Company occurring prior to the effective date of the Civil Rights Act of '64, is competent for any purpose?

The Court: I have ruled that it is not competent for what you are talking about in this complaint. You complained that they're in violation of Title 7, specifically, Section so and so of that Act that we referred to as the Civil Rights Act. That's what you said. You referred, Mr. Chambers, to a Section—that Section became effective in July of '65. Now, how could something without the issue as to whether they are in violation of that Act—how would something that happened prior to its effective date,—tell me—

Mr. Chambers: Even what transpired prior to the effective date of the Act might still presently affect the rights of the employees today, subsequent to the effective date of the Act?

*Colloquy*

The Court: Yes.

Mr. Chambers: If for instance, a Company discriminated in its initial hiring practice, prior to the effective date of the Act, which admittedly was not prohibited by Federal Statute, and put all negro employees as Janitors and now it poses a criteria for negro employees to become employed in positions that [185] were formerly excluded.

The Court: Let's lift it out of the context of Civil Rights for a moment, and say you have an Act that is passed or a law that is passed, and then, a person is accused of violating that law. It is just inconceivable to me that it would have value in deciding the issue of whether he was violating the Act, after its effective date that you go back and show what he was doing prior to that date.

Mr. Chambers: Suppose we consider the school cases, where prior to 1954, it was not unconstitutional to discriminate and subsequent to 1954, it became unconstitutional to discriminate, and the Court then talked about the necessity for taking certain corrective steps to eliminate the discriminatory practices that the School Board followed prior to 1954. Now, wouldn't practices that occurred prior to 1954 be competent in evidence in pointing out what the Board needed to do in order to disestablish—

The Court: I don't think that is analogous to the situation that we have here. As I mentioned, this action is pin-pointed and in a different aspect from that. I don't think that would be a comparable situation.

Mr. Chambers: That was what we—

*Colloquy*

**[186]** The Court: There're all kinds of questions. How far back? Would we sit here and put in evidence—I mean, where do you stop and how far back do you go? Does the fact that much time has transpired since the effective date of this Act? To me, it might make a difference, if this were pinpointed closer to the effective date of the Act, but that isn't true. Here it is more than a year after, is when this action is brought, and of course brought, but it is now '68—more than, '67—it's more than two years now. Where are we going with all this chasing around?

Mr. Chambers: I would think, as far as the Court needed to go—whether to determine whether the present practices of the Company are depriving any individual in the Company of Equal Employment Opportunity. The Phillip Morris decision went back several years.

The Court: But that wasn't really brought up in that—

Mr. Chambers: I think it was necessary for the Court, though, in reaching this decision as to the type of remedy, and also, in reaching its decision as to whether the present practices of the Company violated the right of the employee—

The Court: Well, let's move on to four or five years ahead. Now, are we then—

**[187]** Mr. Chambers: I assume that there have been no corrections of the practices of the Company, even now, after 13 years after the Supreme Court's decision. The Supreme Court—the Courts still allow practices that occurred prior to '54, if we're talking about our coun—

*Colloquy*

The Court: The evidence is going to be in there, and you have it in the Interrogatories, and we're getting Mr. Thies back here, and our Circuit will have no reservation about following what their judgment dictates about it. Let's take our recess until 2:00 o'clock.

Mr. Ferguson: Your Honor, if it please the Court, —I don't know what your normal hours are, but I believe I could get through the Direct Examination of Dr. Moffie in maybe 15 or 20 minutes.

The Court: You have another witness?

Mr. Ferguson: Yes, sir, I have an expert witness.

The Court: Oh, yes, you did mention that.

Mr. Ferguson: If we can finish and shorten the lunch hour somewhat and get back by 2:00 o'clock and finish this Cross Examination—

The Court: How long do you think on Direct?

Mr. Ferguson: I wouldn't say over 15 or 20 minutes.

The Court: I tell you, I have to meet somebody at [188] lunch. Let's come back here at 1:45. Does anybody have any appointments in reliance of the fact that you would be away until 2:00, as we usually do? Would that affect either side?

Mr. Ferguson: No.

The Court: All right, let's come back here at 1:45 instead of 2:00 'clock then, and get into that. All right.

(Lunch recess was taken.)

The Court: All right, Mr. Ferguson, if you are ready to call your witness?

Mr. Ferguson: Come around, Dr. Moffie.

*Dr. Dannie Moffie—for Defendant—Direct*

Whereupon, DR. DANNIE MOFFIE was duly sworn, and testified as follows:

*Direct Examination by Mr. Ferguson:*

Q. State your name, please, sir. A. Dannie Moffie.

Q. What's your educational background? A. I got my BS and MA and PhD at Pennsylvania State University.

Q. What is your present occupation? A. I am a Professor at UNC and a Management Consultant.

Mr. Ferguson: If it may please the Court, I'd like to state for this record that Dr. Moffie is here as an [189] expert witness on behalf of Duke Power Company, and any opinion or statement that he might make, are not those of the University and are his and his alone. He asked me to make that statement for the record.

The Court: All right.

*By Mr. Ferguson:*

Q. Would you name some of the clients for whom you are a Consultant? A. Yes. Burlington Industries, Duke Power, the Company that I was formerly with—Hanes Corporation, Fiber, on occasion—and it's Celanese Fiber Company.

Q. Are you presently engaged in any research in connection with Industrial Testing? A. Yes.

Q. What is it? A. Very much along the lines of the problems that are being discussed here. We are trying to validate tests in a couple of these industries who are also concerned or also in the process of doing research on creativity at the University and looking at creativity

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in terms of how to predict it and how to assess it, and we are doing this really with a Research Grant from the Richardson Foundation, like in the other witness's case, as he is working with the Ford Foundation.

Q. Have you ever been employed in Industry, Dr. Moffie?

A. Yes, I have.

【190】 Q. By what Company and how long? A. I was a Vice-President at Hanes Corporation in Winston-Salem at the Hanes Hosiery Division. It has now merged with P. H. Hanes Knitting Company from 1955 until 1962.

Q. What Professional organizations and societies, if any, do you belong to? A. I belong to the American Psychological Association, the North Carolina Psychological Association,—at the moment, I am transferring my membership in Sigma Phi from State University to Chapel Hill—North Carolina State University to Chapel Hill.

Mr. Ferguson: If it please the Court, I could go through a lot more of Dr. Moffie's qualifications here, but I do have a document consisting of 5 pages, which I have furnished Counsel for the Plaintiffs, and I would like at this time to have it marked as Defendant's Exhibit #2, in which his qualifications and his education and his work experience and so forth is clearly set out together, with the name of his clients and the publications he's made, and the present research in which he is engaged.

The Court: Any objection to this Exhibit, Mr. Belton?

Mr. Belton: No.

【191】 The Court: All right, let the record show that Defendant's Exhibit #2, being a document setting out Dr. Moffie's educational background and work experience, etcetera. All right.

*Dr. Dannie Moffie—for Defendant—Direct*

(Defendant's Exhibit #2 was marked for identification.)

Mr. Ferguson: At this time, I'd like to tender Dr. Moffie as an Industrial Psychologist in the field of testing.

Mr. Belton: Just one or two questions.

The Court: In the field of what?

Mr. Ferguson: As an expert Psychologist in the field of Industrial and Personnel Testing.

The Court: All right, Mr. Belton.

Mr. Belton: Dr. Moffie, I think you indicated that you were doing research along the same lines as Dr. Barrett was doing?

The Witness: Not in the areas of Differential Equations at the moment. What we are doing is—we are doing research in Concurred Validity, and Predictive Validity. We have not attempted anything in the areas of Differential Equations, in terms of various Ethnic Groups. I'm not doing that. It's not that kind of research.

The Court: All right, let the record show that [192] the Court finds that Dr. Moffie is an expert Psychologist in the field of Industrial and Personnel Testing. All right.

Mr. Ferguson: Dr. Moffie—I'm sorry, Your Honor. Did I interrupt you?

The Court: No.

*By Mr. Ferguson:*

Q. Dr. Moffie, are you familiar with the EF1 Wonderlic Test and the Bennett Mechanical Test Form "AA"? A. Yes, I am.

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Q. Are you familiar with the Manual? A. Yes, I am.

Q. Of your own knowledge, please state what extent these tests are being used by employers, if you know? A. As the Wonderlic Test is used very widely—I expect, one of the most widely used intelligence tests in the country—the Manual particularly indicates that it is being sold and used by the 1,000s. In some months, it involves 50,000 cases. The Bennett “AA” is distributed by the Psychological Corporation. It is also used quite widely. There are 3 forms of the Bennett: the Bennett “AA”, the Bennett “BB”, and the Bennett “CC”. The “A” is the lowest form. Then, there is a middle form, and the “CC” is the form that is generally used for the Engineers. I am acquainted with both of them.

[193] Q. All right, sir. What kind of tests are they, please? A. All right. The Wonderlic—the Wonderlic Test is a measure of general intelligence. When it was originally constructed, Wonderlic—they took about 50 items from the Otis Self-administering Test, which is another test of Intelligence, and then constructed some of the early forms. Here recently, he constructed 4 other forms, which are variations, and all of them are comparable, but the test is general intelligence. It measures one's ability to understand one's ability to think—one's ability to use good judgment, and the items in the tests measure these kinds of characteristics or factors.

Q. What about the Bennett? A. Bennett “AA” is the measure of mechanical comprehension. It measures how well one understands the workings of—of pullies, for example or projectories, and this is all done by pictures. It is a measure of mechanical understanding—how a simple machine would operate—the wheel and the lever and so on.

Q. Dr. Moffie, you have heard preference in the testi-



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mony in this case to professionally developed tests? A. Yes.

Q. Based on your knowledge and training as an expert in the field of Industrial and Personnel Testing, do you [194] have an opinion satisfactory to yourself as to whether or not the Wonderlic and the Bennett Mechanical Comprehensive Test Form "AA" are professionally developed? A. In my opinion, they are.

Q. First of all, the Wonderlic was, up until about a year ago, distributed by the Psychological Corporation. The Bennett "AA" is also distributed by the Psychological Corporation, but more than that, the values that indicate reliability and validity and these other 2 criteria that Psychologists used in evaluating a test—is it reliable, that is, does it measure consistently? Is it valid—that is, does it measure whatever it is supposed to measure—its aim, and in both cases, I would say that these 2 tests do meet these criteria.

Q. Dr. Moffie, state whether or not there is any category into which the Wonderlic and the Bennett Mechanical tests fall, for the purposes of administration? A. Yes.

Q. What is it? A. Category "A"—the level "A"—the American Psychological Association has set up 3 levels under which all tests are classified—Level "A", Level "B", and Level "C." Level "A" is that category that can be—that has tests in it, or the tests are classified in it, and that can be given by [195] non-psychologists; category "B" by people who have had some training in testing, either a course or 2, as the Manual indicates; Level "C"—these are the tests that can be given only by Psychologists. Incidentally, these two tests—the Wonderlic and the Bennett Mechanical "AA" are Level "A" tests.

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Q. In other words, they are the lowest level of tests for the purposes of administration? A. That's correct.

Q. Dr. Moffie, do you know who administers the tests or who has administered the tests that have been given at the Defendant's Dan River Steam Station? A. Yes.

Q. Who? A. Mr. Richard Lemons.

Q. Do you know him? A. Yes, I do.

Q. Do you know what his education is? A. He's a Mechanical Engineer by training. He got his degree at North Carolina State University.

Q. Mr. Moffie, state whether or not you are familiar with the testing facilities at the Dan River Steam Station? By that, I mean, do you know where the tests are given? A. Yes, I do.

Q. Would you describe it, please, sir? [196] A. Yes. In preparing for this case, I decided to spend the day up there. The tests are given in a room, I would say, almost half the size of this one, and as a Psychologist, in looking it over, I would say that it meets all of the requirements of a test room, in the sense of ventilation, lighting, seating arrangement, and so forth.

Q. Would you state whether or not you have conducted a Training School for Duke Power Company as it relates to tests? A. Yes, I did. About 2½ years ago, following some of my work with Duke Power, I ran a 1-day training program in Charlotte, where I taught the Personnel Supervisors how to give these tests—how to interpret them—how to understand what the score was, and how to score them, and so forth. This was a 1-day program in Charlotte, North Carolina.

Q. Do you know whether or not Mr. Lemons was there? A. Yes, he was.

Q. Mr. Moffie, do you know what Duke requires as mini-

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minimum acceptable scores on the Wonderlic and the Mechanical "AA?" A. Yes, I do.

Q. What are those requirements? A. We are referring now to the jobs in question—are we not?

Q. No, sir, I'm just asking what minimum acceptable [197] scores are set up or what are the minimum acceptable scores—that Duke would accept on these tests? A. It's 20 on the Wonderlic and 39 on the Bennett "AA."

Q. All right, sir. This is an instrument which has been offered and received in evidence as "Plaintiffs' Exhibit #13," entitled Wonderlic Personnel Test Manual by E. F. Wonderlic. Do you recognize that? A. Yes, I do.

Q. Are you familiar with it? A. Yes, I am.

Q. Directing your attention to Page 5 of Plaintiffs' Exhibit #13, Dr. Moffie, does it state what the average score of the high-score graduate is, on the Wonderlic Personnel Test? A. Yes, it does.

Q. What does it show? A. 21.9. Dr. Barrett pointed it out this morning.

Q. And that is 2 points higher than Duke's minimum acceptable score, isn't it? A. That's correct.

Q. What is the copyright date shown on Exhibit #13? A. 1961.

Q. Dr. Moffie, are you familiar with the Cooperative Research Study of Minimum Occupational Scores for the Wonderlic Personnel Test by E. F. Wonderlic & Associates, Inc. [198] as represented in this black book here? A. Yes, I am.

Mr. Ferguson: I'd like to request that this be marked for identification as "Defendant's #3."

(Defendant's Exhibit #3 was marked for identification.)

*Dr. Dannie Moffie—for Defendant—Direct*

*By Mr. Ferguson:*

Q. Dr. Moffie, this is an instrument that has been marked for identification as "Defendant's Exhibit #3." Would you compare this with Page 53 of the Manual and see if they are one and the same? A. Well, I can't check all these figures.

Q. Does it appear to be answered, "Yes"? Are you satisfied that that is the same page as Page 53? A. Yes.

Q. All right, sir. When was that study published? A. Well, it's in the book, and I assume the date that—that—

Q. When was it published? A. 1961.

Q. 1961? A. I'm sorry. Let me look inside. 1966.

Q. Does the study report "Minimum Occupational Scores by Industry?" A. Yes, it does.

Q. State whether or not "Minimum Scores for Utilities" [199] are reported? A. Yes, they are.

Q. Do you know whether or not Duke Power Company cooperated in the study? A. Yes, it did.

Q. Now, Page 53 shows the "Minimum Occupational Scores for Utilities," does it not? A. That's correct.

Q. Dr. Moffie, you previously testified that you spent a day up at Dan River in the preparation for this case. Are you familiar with the job duties of personnel at the Dan River Plant, and if so, state how you became familiar with them? A. I became familiar with them in two ways: 1, I observed, in moving around through the Plant as to what each job was, and then I also studied the job duties as written by the Company, so that I have seen it from both standpoints.

Q. Dr. Moffie, directing your attention to Page 53 of the study—that is that document that has been marked "Defendant's Exhibit #3,"— A. O. K.

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Q. Would you state the category or categories into which the jobs at the Dan River Steam Station fall? A. The best that I could do would be the last two categories,—the Plant Staff and Line Personnel, and then [200] as I reviewed the jobs, I think many of them would fall in that other category, which is Day Labor, and Special. These would be the categories that I would see them falling into.

Q. What is the range of the scores in those categories? A. For Plant Staff and Line Personnel, these scores go from 27 to 23 and they hover around 18, 19, and 20. Many of them are in that category.

Q. How do these scores compare with Duke's Minimum Acceptance Scores? A. Oh, I would say they are very much in line with what Duke Power has set up, since it is somewhat—and even since it is somewhat flexible,—since as was pointed out the other day that if a person made a score of 19 and say 40 on the Bennett, that that person would still be accepted and so there is some flexibility. My feeling is that the score of 20 hovers right in the middle area here, without any question.

Q. And that is, in the jobs where Laborers could be promoted? A. That's correct.

Mr. Ferguson: I would like to request that this be marked for identification, as "Defendant's Exhibit #4."

(Defendant's Exhibit #4 was marked for identification.)

*By Mr. Ferguson:*

Q. Dr. Moffie, this is an Exhibit [201] #4. It's entitled, "Tests of Mechanical Comprehension, Form "AA" Manual.

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George K. Bennett." I hand it to you and ask you if you recognize it? A. Yes, I do.

Q. Are you familiar with that Manual? A. Yes, I am.

Q. Directing your attention to Page 6 of Defendant's Exhibit #4, does it show the average score of the High School graduate on the Bennett Mechanical "AA" Test? By that, I mean, what does it show as the 50th percentile of the High School Senior average? A. It shows a score of 39, and this is exactly the 50th percentile.

Q. Would you consider this to be the norm for a High School graduate? A. A 50th percentile means that it is the exact average of 50 per cent above and 50 per cent below.

Q. Now, directing your attention to Page 7,— A. O. K.

Q. Of Duke's Exhibit #4, does it show or does the Manual on that page show what the Industrial norms are for the Mechanical "AA" Test? A. Yes, as all manuals, there are various norm tables and the 50th percentile for the norm table that would be in my opinion closest to the jobs under consideration, would be [202] applicants for unskilled jobs, and for that, it is 38, which would be roughly, one level down from the skilled jobs that are being considered here at this hearing.

Q. You don't know what those different classifications across there mean, I take it? A. Well, like in any Manual, there are various types; for example, Engineering positions would be up in the 15s; applicants for Mechanical positions would be 35; Bus and Street Operators, 39; and the closest that I could come to would be Applicants for Unskilled Jobs, and that's 38, and the Company requires 39,—you see, one step up in terms of the job categories.

Q. All right, sir. Dr. Moffie, assuming the greater rate of the evidence shows and the Court should find as a fact

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the following: that Duke's Steam Production Department and in particular, the Dan River Steam Station has a policy of requiring a High School education in order to be considered for promotion in the Coal Handling Operations Department, and from the Labor Department and also from the Coal Handling Operation Departments into the Maintenance and Operation Departments inside the Plant; that the Company has immediately available to it the E. F. Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test Form "AA"; that 50 per cent of the High School graduates taking these tests scored 21.9 on the Wonderlic Test and 39 on the Mechanical [203] Comprehension Test; that Duke utilizes as Minimum Acceptable Scores, 20 for the Wonderlic and 39 for the Mechanical Comprehension Test. Now, assuming that the greater weight of the evidence shows that, and the Court should find this a fact,—those facts, do you have an opinion satisfactory to yourself based on your knowledge and experience in the field of Industrial and Personnel Testing as to whether or not Duke's acceptance of these Minimum Acceptable Scores, is a reasonably satisfactory substitute for a High School education?

Mr. Chambers: Objection.

The Court: Overruled.

The Witness: I do have an opinion.

Mr. Ferguson: What is your opinion?

Mr. Chambers: Objection.

The Court: Overruled.

*By Mr. Ferguson:*

Q. Go ahead. A. My opinion is, as a substitute for or in lieu of a High School education, that this is a reason-

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able request, and frankly, as a Psychologist and working in Industry, I think the Company has leaned over backwards, really.

Mr. Chambers: Objection.

The Court: Sustaine

The Witness: All right. My reasoning behind that is that for a 12-minute test, a man can move into the [204] upper category. My reasoning behind that is that for a 12-minute test, a man can move into the upper category, does not need a High School education, and it is on 25 or 30 minutes on the Bennett "AA." Consequently, if he can pass the test, he has met the Company requirement of a High School education, where, if one has to go to school to get ready for a High School education—just to take a High School Equivalency Exam, this may take 2 or 3 years, and then, there's still no assurance of having passed.

These scores are scores—

Mr. Chambers: Objection.

*By Mr. Ferguson:*

Q. That's all, Dr. Moffie. I. Moffie, this morning, the Plaintiffs introduced into evidence, certain Guidelines on Employment Testing Procedures, as has been put out by the Equal Employment Opportunity Commission. Have you read those? A. Yes, I am very well acquainted with them.

Q. In what terms, Dr. Moffie does the EEOC establish Guidelines with validation? The Commission report of these Guidelines here, have considered validity, exclu-



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sively in terms of Job Relatedness. It is my opinion that in some aspects, the Guidelines are too narrow—

Mr. Chambers: Objection.

**[205]** The Witness: And others are too broad.

The Court: Overruled.

The Witness: I think they're too narrow in the sense that there is more than one type of validity. We have got Content Validity, there is Job Validity or Criterion Validity. We have Construct Validity and very often, as was pointed out this morning, Industry has to use its best judgment. One can't wait for Predictive Validity or Concurrent Validity. Consequently, the Guidelines are a little too narrow, from that standpoint, and it is well-accepted in Psychology that we have 3 types of validity,—Content Validity, Criteria-Related Validity, and Construct Validity. I think they are too broad in other cases where, when a professionally developed test is considered. As defining the law, professionally developed, as considered by the Guidelines, are too broad in the sense that they want to consider the testing facilities, who gives the test, the administration of the test, and normally to a Psychologist, a professionally developed test means that it meets the criteria of validity and reliability and validity, in any of these 3 categories that I have indicated that that would be my opinion.

*By Mr. Ferguson:*

Q. Dr. Moffie, directing your attention to Page 3 of Plaintiffs' Exhibit #34, I will ask **[206]** you to state whether

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or not the Commission recommends any particular test?

A. No, it does not.

Q. Further directing your attention to Page 3 of the Guidelines, state whether or not the Commission adopts job-related tests as the last words? In other words, do they say that just special emphasis should be put on it, or do they say that that is the only way? A. Well, I think the Commission is also trying to find itself, too, in establishing these Guidelines, but the Commission does imply as a last word, that it must be job-related. I get that impression, as I read the Commission Guidelines.

Q. All it requests is that they place special emphasis on it? A. Yes.

Mr. Ferguson: You may examine him.

The Court: All right, Mr. Belton.

*Cross Examination by Mr. Belton:*

Q. Dr. Moffie, did you assist the Company in establishing the Cut-off Score for the Wonderlic? A. Not on this particular situation. I did, in terms of the total battery—for the Company as a whole, but on this particular situation, I did not—that is, in this particular job. I don't know whether I am making myself [207] clear on this. For this particular situation, I did not.

Q. When you say particular situation— A. I am referring to Dan River Mills, yes.

Q. Dr. Moffie, I believe you made a reference to Dan River Mills— A. Dan River Steam Plant, I'm sorry.

Q. Prior to your visit to the Dan River Steam Station, had you made a study of the job contents at Dan River? A. Yes, I did.

Q. When did you visit Dan River Steam Company—

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Steam Plant? A. A week ago, today, I believe. Yes, a week ago, today.

Q. Was that your first trip? A. Yes, it was.

Q. Did you have knowledge of any written job descriptions prior to the ones you referred to in your Direct Examination? I think you referred— A. Yes, the ones that are used here.

Q. Would the written job descriptions be the ones—that were given to us? A. Yes, these are the job duties that I have seen. When the original cutting scores were established, it was done largely in terms of interviews with Mr. Austin Thies, Kenneth Austin, and this was done about 2½ or 3 years ago, [208] when the original tests—when the original cutting scores were established. This was in Charlotte. This was done entirely in terms of interviews as to what the jobs required at each of the job levels.

Q. And whom did you interview? A. Austin Thies.

Q. Did you interview him? A. Yes. And we spent roughly 2 days in discussing the various types of jobs in Charlotte—Kenneth Austin, too, who isn't here at this time.

Q. Did you assist Duke Power in selecting the Wonderlic Test? A. Yes. At the same time, it was being used by other Utility Companies, and it wasn't just a recommendation entirely on my part. It was a support of this test plus the fact that other Utility Companies were using it, but I have used this test in the Industry that I was in, for example. O. K. Go ahead.

Q. My question was, did you assist or recommend to Duke Power that they select the Wonderlic Examination? A. Well, it wasn't exactly a final recommendation; you see, it was a joint—it was a joint decision between myself and the officials of the Company, and I recommended it cer-

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tainly, as a professional test, but it was being used by the Utility Industries.

**[209]** Q. Did you recommend the Mechanical Test? A. Yes, I did.

Q. When approximately did you make the recommendation that the Wonderlic be used? A. This goes back to—in fact, July of '65. July of '65, is when I wrote my original recommendations to the Company.

Q. Now, you said that you had several days of discussion with officials concerning jobs? A. That's correct.

Q. Did they give you detailed information as to job content? A. As detailed as one can get at, let's say, interviews; as detailed as I felt like I needed, in terms of what I would want to decide on—what tests we would select, yes. The interviews supplied me in terms of helping to make the selection. O. K.?

Q. Do you think that your opinion would have been changed, Dr. Moffie, if you had done it and done an outside inspection of what actually goes on in each job? A. I don't think so.

Q. I think you testified as to your opinion of what a professionally developed test is? Is that correct? A. That's correct.

Q. Were you here this morning, Dr. Moffie, when **[210]** Dr. Barrett testified? A. Yes, I was.

Q. Do you recall the testimony of Dr. Barrett to the extent that definition of job content is to be considered in the selection of a test instrument? A. Yes, I would agree with what he said.

Q. Do you recall the testimony that of Dr. Barrett to the extent that validation would be a consideration in the selection of a test instrument? A. Yes, I agree to that.

Q. You testified, I believe, that a professionally devel-

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oped test should include— A. Should be reliable and it should be valid.

Q. Now, my question is this,—when you speak in terms of validity— A. That's right.

Q. Would you give us your definition of it? A. O. K. Well, it's really not my definition. These are standards, established by the American Psychological Association, and they are standards that we go by in Psychology—that validity is really, does the test measure what it has been set up to measure? What are its aims, and we go by the fact that there are 3 types of validity: Content Validity, Criterion-related Validity, and Construct Validity. So to me, when we talk about Validity, it's not just [211] Job-Related Validity. It's got to be any one of these three, you see.

Q. Has the Wonderlic been validated—how has it been validated? A. You mean, at Duke Power?

Q. Not for Duke Power, but has validation been conducted on the Wonderlic? A. Yes, I would say there have been hundreds of studies that have been done in one way or another where the Wonderlic has been used, and reasonably high coefficients have been found—that is, validity coefficients. If we are thinking of Concurrent Validity or Predictive Validity in terms of Job-Relatedness, very definitely.

Q. I think you indicated that there is Content Validity? Is that correct? A. That's correct.

Q. Were the Validation Studies done on the Wonderlic—Content Validity studies? A. In the original Wonderlic, Content Validity would be where the items were taken, let's say, from the Otis Test, which is another intelligence test, and then when that test is related to other intelligence tests, and if there is a high correlation and a high relationship, then it satisfies the Criterion. Content Validity—I would say that the Wonderlic has met that Criterion, but

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it has also met the **[212]** Criterion of Jobs-Relatedness. There have been many studies that have done that.

Q. My question is, do you know whether Content Validation studies have been done on the Wonderlic for Duke Power? A. Well, you don't normally do that. You see, you assume that this is already been done, when tests have been constructed. When you say, Content Validity, I say, no, this has not been done. Industry doesn't normally do that. We are doing Job-Related Validities. For example, we have completed 1 study where we had taken oh, roughly 100 to 200 people, in some categories well over 200 people at different job levels, where we have attempted to validate the Wonderlic, and we are finding, as was pointed out this morning by Dr. Barrett, that we are too broad. We are going to have to become more definitive and take some specific jobs and build up samples in order to carry out these validities to a greater extent, and to do it in more depth. We have got one study going right now that has 120 people, and this, I'm afraid is going to be too broad—

Q. You say—now, is this being conducted at the Duke Power facilities? A. That's correct—throughout the facilities.

Q. Now, the validation studies that are underway, does this include any category of jobs? Now, when you said the Dan River Steam Station— **[213]** A. They would be included in Job Level 1. You see, the Company has these jobs classified—Job Level 1, Job Level 2, Job Level 3. I don't recall. I can't answer that. I'd have to go back to the data to see if any of the people at Dan River fell into this—under this grouping.

Q. Dr. Moffie, you said you did undertake to visit Dan River Steam Station. Is that right? A. Yes.

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Q. Do you recall whether or not they had persons working there in the Control Room? A. Yes, a number of them.

Q. Do you know whether the study that you talk about would include employees in this category? A. I'm sure it would, yes, because it was Job Level 2, and Job Level 2 would include people in that category, yes.

Q. Do you recall during your visit, Dr. Moffie, whether they had employees working in Coal Handling at Dan River? A. Oh, yes, sure.

Q. Do you know whether validation studies are underway, now, including employees in this category? A. They would have to be because they would be in Job Level #1.

Q. Do you recall during your visit to Dan River [214] whether they had employees working in the Maintenance Department? A. Yes.

Q. Would employees in this category be in it? A. They would be in Job Level 2, I am sure—Job Level 2.

Q. Do you know when the validation studies were started? A. Oh, yes, about 2 years ago. We have started—

Q. Was that before July 2nd, 1965? A. No, it was after that—2 years ago. That would be—that would be roughly in the early—in early '66, I would say. I would have to go back to the date, but that's about when it would be.

Q. Now, Dr. Moffie, you are aware that Düke Power at Dan River does require a person in a Laborer's category who does not have a high school education or equivalency to successfully pass the Wonderlic and Mechanical? Is that correct? A. That's correct.

Q. Now, my question is, would you expect a test using such circumstances to be validated and we're talking about Predictive Validation at this point, before it is used to effectuate these results. What I mean by "effectuate these results" is as used, in order to determine his [215] promot-

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ability? A. Yes. At Dan River, the tests are really not used for Predictive Validity. They are used as a substitute or in lieu of a High School education. The aim is different. Now, to do a Predictive Validity study, as was pointed out this morning, generally, you have to have a fairly good sized group, and sometimes this is not possible, even at Dan River Steam Plant. The groups wouldn't be large enough. Moreover, on a Predictive Validity study, it may take 2 or 3 years to do this, but the tests at Dan River Steam Plant, as I understand it,—these are used in lieu of and a substitute for a High School education. They are not predicted. They are used as a substitute.

Q. Are you saying, Dr. Moffie, that the use of the test in the circumstances you've just described, as a substitute for a High School education, is not the same use to which such tests would be used when you are defining or giving your opinion as to a professionally developed test? A. Oh, no, I didn't say that.

Q. I'm asking you if this is your testimony? A. My testimony is that at the Dan River Steam Plant, the two tests are used to determine whether or not a person has the intelligence level and the mechanical ability level that is characteristic of the High School graduate, and this is it. These are the purposes of the test there. Now, when [216] they function as a substitute or in lieu of a High School education, then, the assumption is that the test then,—the High School education is the kind of training and ability and judgment that a person needs to have, in order to do the jobs that we are talking about here—the jobs in the Control and the Coal Handling and in the Maintenance. This would be my testimony.

Q. Do you know, Dr. Moffie, whether or not the same cut-off scores that are used, under the circumstances they are



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used at Dan River, with respect to Coal Handling and Laborers, is the same score that is used on this test with respect to applicants for employment? A. Yes, that is, for these level jobs that we're talking about—not for the Laboring jobs. They are not used for the Laboring jobs. They are used for the jobs that we are talking about here in this hearing. Yes, they are.

Q. Just to understand your testimony, you are saying then, that a person who is applying for a job and would be subjected—who would be required to take the Wonderlic, would have to score? A. He would have to score 20 on the Wonderlic and he would have to score 38 or a Bennett "AA" or with the flexibility of 1 point either way,—as we pointed out, in order to come into the jobs, under discussion here at this hearing, yes.

【217】 Q. Now, are you familiar with the requirement that all employees except those who are applying for the categories of Laborers, must possess a High School education at Dan River? A. Yes.

Q. Would the cut-off scores—scores for the Wonderlic, Dr. Moffie, would the result be to exclude more than 50 per cent of the Labor population? A. It comes to less than that, really. You see, if you think of the average High School graduate, the score is 21.9, which is roughly 2 points above, and then if you take a look at the tables, it is going to be less than that, really. If you take a look—let's see if I can find you the tables, right off, here. You go to Page 7—you go to Page 7, you will notice that for the High School, male, 4 years High School, a score of 20 to 21, you would have roughly 42.8 per cent below that, you see, so that if you look at those figures, I think you would have to conclude that it is 40 percent. It will be

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cutting roughly 40 per cent or less, really, so it is not 50, really. Have you got the page, there? It's Page 7.

Q. Page 7. Now, would the test score set for the Mechanical "AA"—your cutting score for the Mechanical "AA"—would the results of that cutting score be to exclude more than 50 per cent of the Labor population?

[218] A. The score of 38 is exactly the 50th percentile, and it is for applicants for unskilled jobs. Now, this is the Laboring group. Now, if you think of the higher level up, or the jobs under consideration here at this hearing, you see, the score is even below. In other words, the group is below the type of score that would be normally assigned, let's say, to the jobs under consideration; so that exactly how many points—it may be 2 or 3 points below, really, what the tables indicate here. In my opinion, the two scores are rather typical of the average High School graduates, I think. I think this would answer your question.

Q. Now, my question, Dr. Moffie, is would the results of using both tests together result in excluding more than 50 per cent of the population? A. Not, necessarily. In fact, it might improve, because you see, the Company has some flexibility in this in the sense that if a person makes a lower score—let's say, 19 on the Wonderlic and let's see, 40 on the Bennett "AA", this person has a chance of coming in or vice versa, so that—so it could improve the selective aspects of this thing and make it even easier, really.

Q. Dr. Moffie, are you aware that Duke Power has a policy whereby employees in the Laborer's category do not have a High School education or its equivalency, may take both the Wonderlic and the Mechanical "AA" for consideration [219] for promotion to Coal Handling? A. Yes, I am.

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Q. Are you aware that Duke Power has a policy whereby employees in the Laborer's category do not have a High School education or its equivalency, may take both the Wonderlic and the Mechanical "AA" for consideration for promotion to Coal Handling? A. Yes, I am.

Q. Are you aware of the policy of the Company that employees in the category of Coal Handling who do not have a High School education or its equivalency, may take the Wonderlic and the Mechanical for promotion to other job categories? A. If they are already in it?

Q. No, my question is just a re-phrase of my earlier question,—that employees in Coal Handling who do not have a High School education or equivalency, could take the Mechanical and the Wonderlic to be considered for promotion to other jobs, other than Laborer's category? A. Yes, I think this is the real point that's under consideration. Yes, in other words, that is the policy that if the person does not have a High School education, then he is permitted to take the 2 tests and if the 2 tests—if he passes these 2 tests successfully, then the Company considers passing these 2 tests successfully in lieu or as [220] a substitute of a High School education. Yes, I am aware of that.

Q. Would you have a opinion as to what factors that the tests would measure concerning the job requirements in Coal Handling? A. Yes, I very definitely do. The intelligence test, the Wonderlic Test, is a measure of one's ability to think, to use good judgment, to solve problems. The Mechanical aptitude test is a measure of mechanical comprehension, and after studying the job duties and taking a look at those jobs up there, my feeling is that these kinds of abilities are required—the logging, the importance of all of the controls, and I may express an opinion: the

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tremendous amount of money that is involved in terms of the generators that they've got and the necessity in maintaining these.

Q. My question was just the Coal Handling. A. There are lots of controls there.

Q. Would there be other criteria, Dr. Moffie, that could be used to determine those factors you've just described?

A. Other tests, you mean?

Q. Not formalized tests but other considerations whereby you can make this determination of a person's ability?

A. Oh, sure. There would be many. For example, [221] there could be other tests that could be used, and as Psychologists operate, we interview sometimes, too. At the same time, we are finding out more and more that the tests must be used to determine specific levels—that we cannot do it by interviews or by observation and so on. Now, for the aims that were set up here, I don't see how one could interview and come up with a score on intelligence and a score on mechanical aptitude. For this particular situation, let's say, it would be difficult to do. Looking at it as a Psychologist—

Q. You indicated that interviews would be another way of making this determination. Is that correct? A. You mean, as a substitute for a High School education?

Q. Right. A. It would have to be highly structured and it would have to be validated, too, you see, and one would have to establish reliability and validity; I'd hate to try it, but I say, maybe it could be done.

Q. Would you list for me, Dr. Moffie, 1 or 2 other selection processes, if you would, that would aid in determining whether a person has the ability to do the jobs in the Coal Handling Department? A. Yes, the High School equivalency exam. I think this has been my point—that

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the GED, the General Education [222] Development Test or the High School equivalency test is what one normally uses, and this is why I say that the Company has leaned over backwards by having a 12-minute test and roughly a 30-minute test in the Bennett Mechanical Comprehension, to see if they have got this kind of ability that makes them like an average High School person. Yes, very definitely, we have by State Law and through the State Board of Higher Education—through the Boards of Education, the High School equivalency test. This is the way it is normally done.

Q. When you say, "lean over backwards" in establishing cut-off scores, would this leaning over backwards, would it be—would it—my question is, would this leaning over backwards in—of the purport of the professional standards— A. I'm not so sure I know your statement now. I think the Company—I think the Company has used acceptable scores that are by the tables and norms, typical of the High School graduate. By leaning over backwards, I mean that the Company has established the 2 tests—the one that takes 12 minutes and the other that takes 30 minutes and if the person is able to pass these two tests, then he doesn't have to go through all of the courses that he has to take to get ready to take the High School equivalency test. This is what I mean by leaning over backwards.

Q. There are several other questions. A. O.K.

[223] Q. Just one other question, Dr. Moffie. Would you consider previous experience on a lower job as a selection factor for promotion? A. Are you talking in general now—Industry-wide? I'm not sure I get the point of reference. If you ask me in terms of Industry-wise—

Q. To clarify the question, if you will, I think I asked

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you to list for me some of those selection factors—selection criteria that you would use in lieu of, and I think you had indicated that High School was one, the interview— Now, my question is, what previous experience would act as selection device—would previous experience on a low-rated job act as a selection device for promotion?

A. I think you are leading me into the type of an answer that I don't think I can give. When one considers promotion and all these policies have been established within the Company, then all of these factors are important. For example, in selecting a salesman, if I can think of jobs in general, we always use previous experience as one of the factors and interview test scores and so on; where a Company has already established, however, a High School degree or diploma as the admittance, then that becomes set. Then, you have to go by that. So, if you are asking me, can you accept previous experience to take the place of a High School diploma where a Company has already established the [224] High School Diploma, my answer is, no, definitely not. You cannot do that. The only way you can establish a High School diploma is through a High School equivalency test. If you are saying a High School equivalent substitute—the Company's substitute test, this is in lieu of or a substitute for a High School education—

Q. Just to put the question again, would this be a factor that could be considered—previous experience in determining whether to promote or not to promote? A. You mean, for these particular jobs in question?

Q. For these particular jobs in question. A. No, not when the Company has set a High School equivalency.

Q. I'm saying, aside from that, what the Company has done. A. That's not the issue. The issue is, are the 2 tests—are the 2 tests reasonable substitutes for a High School education? That's the issue.

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Q. That's not my question, though. A. I would say, no, if you are asking me, can I determine in an interview whether or not the person has the equivalent of a High School education. I cannot.

Q. That's not my question. Let me clarify it, because I do want you to address yourself to it. I'm not asking you to relate this to the requirements that the Company now has. [225] My question is this: given a situation where a person, if you will, in the Learner's position in Coal Handling—I am asking you, would his experience in the position of Helper be a selection factor—could it be a selection factor in determining whether to promote him to the next highest position? A. It would be a factor, but that in itself wouldn't tell me whether he has the ability or the trainability for a job at a higher level. It merely means that he has been in this job, and he has had this experience, but this doesn't say, does he have the ability or the trainability for the higher level training jobs? No; I can answer that question very emphatically, no. This experience would not tell you that.

Q. Would the tests by themselves tell you this? A. No, the tests could not. You would have—

Q. Would the High School education by itself tell you this? A. A High School education would merely tell you that you have the necessary abilities as defined by a High School education, and if the Company feels that this is required in these jobs, that's all it would tell you.

Mr. Belton: No further questions.

The Court: All right.

Mr. Ferguson: Nothing on Re-Direct. Does the [226] Court have any questions of this witness?

*Richard S. Barrett—for Plaintiff—Resumed—Direct*

The Court: No, you may come down, Dr. Moffie.

(Witness excused.)

I believe that Mr.—Do you have something Mr. Belton?

Mr. Belton: Yes, Your Honor. I'd like to call Dr. Barrett back for a few questions in rebuttal.

The Court: All right, Gentlemen, this is a case you assured me we could try in one day. I have this letter before me now. All right. You all have a copy of the letter. Mr. Chambers wrote it, and you didn't take exception to it.

Mr. Ward: If Your Honor, please, if I had seen it, I would have taken exception to it.

Mr. Ferguson: That was based on his assumption, Your Honor.

The Court: Yes, but he put you on guard. You should have notified the Court that he was in error.

(Dr. Barrett resumed the stand—was previously sworn.)

*Direct Examination by Mr. Belton:*

Q. Dr. Barrett, there are several questions. Would the use of the 2 tests—the Wonderlic and the Mechanical—would the cut-off score now in use at Dan River result in excluding more than 50 per cent of the [227] population?

Mr. Ferguson: Objection.

The Court: Overruled.

The Witness: I think that the use of these 2 tests simultaneously is a considerably more stringent requirement, —

The Court: Now, this is in the form of an opinion?



*Richard S. Barrett—for Plaintiff—Resumed—Direct*

The Witness: Yes.

The Court: All right.

The Witness: Than the High School diploma itself for a couple of reasons. In the first place, according to the norm tables on the test of Mechanical Comprehension, the average High School student scores 39. However, many, many people graduate from High School with ability that is less than average. In fact, about half of the people are below average, so it should be considerably easier to get a High School diploma in terms of the intellectual requirements than it is to score 39 on the Bennett, because that means you have to be up well into the average group. People get out with a "D" average. The average that we have here that we're talking about here is about a "C" average. Furthermore, if you use the 2 tests in conjunction, you wind up with this circumstance: the first test eliminates half of the people, but some of those people who passed that [228] will fail the other test. Therefore, you are eliminating noticeably more than half the people. Again, this makes it even more stringent than being an average High School graduate. No; no, they have shaded this by about 2 points, which helps compensate for this point, but the issue is that this is really much more difficult than it is to have the High School diploma.

*By Mr. Belton:*

Q. Dr. Barrett, did you hear Dr. Moffie testify concerning the use of the Wonderlic and the Mechanical at the Dan River as a selection device? A. Yes.

*Richard S. Barrett—for Plaintiff—Resumed—Cross*

Q. Did you also hear Dr. Moffie testify concerning the use of a High School education as a selection criteria for promotion? A. Yes.

Q. Now, in your opinion, would you think that the High School education would be the most appropriate requirement for promotion?

Mr. Ferguson: Objection.

The Court: I have to sustain that.

Mr. Belton: No further questions.

Mr. Ferguson: Just a couple of questions, if I may, please, sir.

*Cross Examination by Mr. Ferguson:*

Q. Dr. Barrett, I believe you [229] stated that you had never been up to Dan River? A. That's right.

Q. You don't know what the content of the jobs are other than what you read? A. Right.

Q. You state that in your Re-Direct Examination that the use of the test is more stringent. By that, you don't mean to imply that Duke Power was unreasonable, do you?

Mr. Chambers: We object to that.

The Court: Overruled.

*By Mr. Ferguson:*

Q. I mean, you can't testify to the reasonableness of what Duke Power Company is doing, can you? A. The reasonableness that I am concerned with, has to do with the reasonableness of substituting one procedure for another. Now, if we take for granted, which I do not necessarily take for granted, that a High School diploma is an appropriate standard for people to meet, either for selection or promo-

*Richard S. Barrett—for Plaintiff—Resumed—Cross*

tion, then, I say, that the use of these 2 tests, — the Wonderlic Test and the Bennett Test as described in the testimony here, is not a reasonable substitute in that it is noticeably more difficult. It places higher intellectual demands on the people than the High School diploma. The High School diploma takes effort and time to get, and these are otherwise tests of basic ability.

**[230]** Q. Are you saying that a High School graduate has made a certain amount of achievement? A. Of course.

Q. And you are saying, too, that he has a certain mental ability level, too, are you not? A. Achievement is something we know because we measured it by test. We don't know what his mental—mental ability is. We have an idea what it is, in order to pass through the High School course.

Q. What is more reasonable that taking of what 50 per cent of them make—with what the High School seniors average? A. If you accept all High School graduates with their diploma and accept only the top half of people of High School graduates because of their test score, you have a much more stringent way of selecting people. It is much more difficult.

Q. How is it more stringent? A. Because, you say, anybody who gets a High School diploma is qualified to go through the selection procedure from there on. Now, by using this test you are saying that only the half of the people who have the capacities, of people who get High School diplomas, are able to go through the rest of the inception procedure and pass this hurdle and gone on.

**[231]** Q. You have stated, at best, this is a difficult problem, haven't you? A. I don't know what you mean, sir. What is the difficult problem?

Q. This testing presents a particularly tough problem? A. Why, yes, sure.

*Richard S. Barrett—for Plaintiff—Resumed—Cross*

Q. It is just not an easy thing to go out here and validate tests overnight and say, "This is the proper way to do it?" and "This is the improper way to do it;" and, "This is more stringent;" and "This is less stringent;" and "This is unreasonable;" and "That's not reasonable." I am driving at this, that back to your article, wherein you say that since each employee faces a situation that is in some respects unique, he and he alone is in a position to develop and validate tests and other selection procedures which will help him to hire the best available employees, regardless of race. Now, you made that statement. A. What's your question?

Q. My question is, and I've asked you on several occasions, whether or not you can't say this is unreasonable as far as Duke Power Company is concerned, can you?

A. I think you, in your preamble to the question, went from the point that it is difficult on to further shading, which is not what I have said. To say that it is difficult is not saying that it is impossible; to say that [232] it is difficult to produce good procedures is not saying that it is impossible to say that some procedures are not good, and this is what I am addressing myself to—that the sheer logic of these tables, and these are the tests, is that the use of the tests is a more stringent and noticeably more stringent way of selecting people than is the use of a High School diploma or its equivalent, since half the people who get a High School diploma would fail the test.

Q. All of them have the mental ability level, don't they? Everybody has some mental ability level, whether they went to High School or college, or has a PhD in Psychology?

A. O. K.

Q. If the Power Company's purpose is to measure a mental ability level— A. Yes?

*Richard S. Barrett—for Plaintiff—Resumed—Cross*

Q. We can assume, can we not that the average High School graduate has the mental ability level that the 50th percentile has, can't you? A. Well, you don't assume that because there are some people who work very hard and get to be an average High School student, and they're not so smart; and there are other people who are lazy; they come out average, too.

Q. Everybody has a mental— A. Everybody has some capacity for intellectual activity, yes.

【233】 Q. And you have heard testimony that that is what Duke Power Company is attempting to measure—is mental ability level, haven't you? A. Yes.

Mr. Ferguson: I think that's all.

The Witness: O. K.

The Court: All right.

(Witness excused.)

The Court: Anything further?

Mr. Belton: No.

The Court: All right, I think we will just remain for Mr. Thies' examination. Do you have anything further?

Mr. Ferguson: Yes. I want to introduce 1 more bit of evidence here, but we need about a 5 or 10 minute recess to talk to Mr. Thies, if that's all right with the Court, since he just got here, and we haven't had an opportunity to confer with him.

The Court: Gentlemen, I had relied on the fact that this was a day—now, we've had—passed a day and a half, and I have some matters—I know it's an important case to all of you—I have some matters that I must really move back to doing, so I ask you

*A. C. Thies—for Defendant—Resumed—Cross*

to do it as quickly as you can, and you people be thinking about the questions you want. This shouldn't take you so [234] long to get this into the record.

Mr. Ferguson: 5 minutes would be fine with us.

The Court: You let me know when you're ready to go. You all be thinking about the questions you want to ask, and let's conclude this matter. All right this is an undeclared recess. Mr. Ferguson and Mr. Belton, you notify me when you are ready to go.

Mr. Ferguson: All right, sir.

(A brief recess was taken.)

The Court: All right, Mr. Ferguson, are you ready?

Mr. Ferguson: I'm ready to tender Mr. Thies for Cross Examination.

The Court: Mr. Thies, would you come back to the stand, please, sir?

Clerk Vaughn: You are still under oath. This is a continued further Cross Examination.

The Court: Mr. Belton.

*Further Cross Examination by Mr. Belton:*

Q. Mr. Thies, my question is, was there a policy at Dan River—at the Dan River Steam Station to hire only Negro employees for certain job categories prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained. But you may put it in the record.

[235] Mr. Ferguson: Answer the question.

The Witness: There was not a policy to hire only Negro employees for any classification at Dan River.

*A. C. Thies—for Defendant—Resumed—Cross*

*By Mr. Belton:*

Q. Did the Company, before July 2nd, 1965, hire only Negroes for the Laborer's Classification?

Mr. Ferguson: Objection.

The Court: Your question is, before the July date?

Mr. Belton: That's right.

The Court: Sustained. But you may answer, Mr. Thies, for the record.

The Witness: As far as the Power Station operating Steam Production Department is concerned, all of the persons who made application for the Laborer Classification were Negroes. However, there were 2 white employees in the Laborer Classification at the time the Plant was being built, but those men moved on away with the Construction Department, when the Construction Department left the job site.

*By Mr. Belton:*

Q. Do you know, Mr. Thies, whether any Negro employees in the Laborer's category requested promotion to other jobs prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained, but you may answer for the record.

The Witness: Yes, they did.

**[236]** *By Mr. Belton:*

Q. Do you have an approximation Mr. Thies of the number of Negroes who made requests for promotion prior to July 2nd? A. Yes, sir.

Q. Would you give that?

*A. C. Thies—for Defendant—Resumed—Cross*

Mr. Ferguson: Your Honor, I don't necessarily object—want to object to every term, but I do want to have my objection recorded to this continuing line.

The Court: You had better object.

Mr. Ferguson: All right, I object.

The Court: All right. Sustained, but you may answer.

The Witness: To the best of my knowledge, there was one.

Mr. Belton: Was this request for promotion directed to you?

Mr. Ferguson: Objection.

The Court: Sustained, but answer.

The Witness: It was directed to the Superintendent of the Station. It was directed to the Station Superintendent. I am located in Charlotte. I set the policy. The Superintendent of the Station administers locally. The request was directed to the Power Station Superintendent by one individual in the Laborer Classification.

[237] The Court: About what year was that, Mr. Thies?

The Witness: I can't testify from my own knowledge, but to the best of our recollection, it was in 1964, and there was no job opening at that time for the place that he wanted to work, and he was not refused a job. He was told, at the present time there was no job opening.

Mr. Belton: Do you know, Mr. Thies, whether you had Negro employees in the Laborer's category with a High School education, who were in that category prior to July 2nd, 1965?



*A. C. Thies—for Defendant—Resumed—Cross*

The Witness: Yes.

Mr. Ferguson: Objection.

The Court: Sustained, and the answer is, "Yes."

The Witness: I am assuming, Your Honor, this is automatic each time?

The Court: Yes, but if you will just give me time to make the entry there. That's all right. Go ahead.

Mr. Belton: Do you know whether you had white employees in jobs other than Laborers, without a High School education, prior to July 2nd, 1965?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: Yes.

**[238]** Mr. Belton: Was it the policy, Mr. Thies, of the Company prior to July 2nd, 1965, to employ persons only in those categories for which they requested?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer for the record.

The Witness: The general policy was, "Yes." To employ persons in the kinds of jobs that they expressed an interest in, yes.

Mr. Belton: Do you know what—do you know if the policy of the Company of July, 1965, was to promote employees only to those jobs for which they requested?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer for the record.

The Witness: No. We promote employees that we think—that we think can do the next higher job, and if they are in a department and in line of normal

*A. C. Thies--for Defendant--Resumed--Cross*

progression or promotion, then they are all interested in this promotion as it comes up, and we select the senior man, if qualified, and offer him the job. He doesn't have to request it within a departmental promotion set-up.

Mr. Belton: Do you recall, Mr. Thies, whether there were occasions prior to July 2nd, 1965, in which [239] the Company of its own initiative requested an employee to move up to a higher paying job to fill a vacancy?

Mr. Ferguson: Objection.

The Court: Sustained. Answer for the record, please.

The Witness: Yes, I am sure that there have been. I don't know the specific cases, but I am sure that people have been asked to move up to higher jobs, yes.

Mr. Belton: One or two other questions, Mr. Thies. Prior to July 2nd, 1965, did you have employees who were in Coal Handling without a High School education moved to—well, were promoted to jobs in the Maintenance Department?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: We did not, during the last 10 or 12 years—during the time that the policy requiring a High School education for this move, has been in effect. Prior to the time of that policy going into effect on our Power System, then, we did have employees who did not have a High School education, who moved from Coal Handling into the Plant Operations, but when that policy was instituted

*A. C. Thies—for Defendant—Resumed—Cross*

System-wide, the practice was stopped. In fact, that's what made me select these 2 tests—to offer them an opportunity to be qualified, [240] because the white employees that happened to be in Coal Handling at the time, were requesting some way that they could get from Coal Handling into the Plant jobs, and they were blocked by this policy, which has been in effect for a number of years.

Mr. Belton: Do I understand your answer, Mr. Thies? Are you testifying that after the Company initiated the High School requirement, that no employee in Coal Handling was allowed to move from Coal Handling to other jobs without this?

The Witness: That's correct.

Mr. Belton: Now, the High School—the provision went into effect around 1955?

The Witness: Somewhere along in there.

Mr. Belton: Prior to July 2nd, 1965, did you promote employees in Coal Handling—allowed employees in Coal Handling, who did not have the High School education or the equivalency?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: They were promoted within the Coal Handling Operation, but not out of Coal Handling into any other department. Once a man is in the Coal Handling Department and in a line of progression, then he will move as far up in that department as his qualifications [241] and job performance will let him move. He won't be blocked, is what I am saying, and, once he gets in that department.

Mr. Belton: Weren't these employees in Coal Handling during the period we're talking about, white employees?

*A. C. Thies—for Defendant—Resumed—Cross*

Mr. Ferguson: Objection.

The Court: Sustained. Answer for the record.

The Witness: Prior to July 2nd, 1965?

Mr. Belton: This is correct.

The Witness: Yes.

Mr. Belton: One other question,—Mr. Thies, prior to July 2nd, 1964, was there a custom at the Dan River Steam Station whereby certain facilities,—toilets, water fountains, were limited to Negroes?

Mr. Ferguson: Objection.

The Court: Hasn't that been eliminated from this case? You all stipulated.

Mr. Ferguson: By stipulation of Counsel—

Mr. Belton: Your Honor, we realize that. This is our last question, but even though we have stipulated—

The Court: O. K. Go ahead. I will let you answer for the record. That just seems to me a bit—but the question—go ahead with the question.

The Witness: That was prior to July 1st, 1964?

[242] Mr. Belton: That's correct, sir.

Mr. Ferguson: Objection.

The Court: Sustain the objection, but you may answer.

The Witness: Sometime in the early '60s, we eliminated separate facilities at our stations, as far as policy was concerned; that there was no one to occupy different facilities because of their race, creed, national origin or what have you. We did not force our employees to bodily pick up their belongings and move their lockers to accomplish this. We said that anyone was free to choose any locker they wanted. The individuals in question at Dan River were in one

*A. C. Thies—for Defendant—Resumed—Cross*

locker room, and they remained there, but there was no policy that said they had to stay there, after some time in the early '60s.

Mr. Belton: This is my last question. My question was not in terms of policy, but was it a custom, as opposed to a fixed policy?

Mr. Ferguson: Objection.

The Court: Sustained. You may answer.

The Witness: Well, I thought my answer clarified that, but they did remain in one location, so if you call that a custom, then they were in one location, yes.

Mr. Belton: No further questions.

**[243]** Mr. Ferguson: That's all. I have no questions, Your Honor.

The Court: All right. Anything further, Gentlemen? Anything further for the Plaintiff?

Mr. Belton: No, Your Honor.

The Court: From the Defendant?

Mr. Ferguson: Yes, Your Honor, I want to have this document marked for identification. It's Page 4. It's that Page 4 of the Digest of Legal Interpretation adopted by the Commission. It is a Digest of Legal Interpretations issued or adopted by the Commission, July 2nd, 1965 to October the 8th, 1965—Page 4 of that document, waiver of identification, and authentication of which has been waived by the Plaintiffs in the Final Pre-Trial Order, and the document speaks for itself. I am averting particularly to their general Counsel opinion letter, which states that "the Differential - - not based on one of the exprohibitive grounds—that is, sex, race, and so forth, and further, that discrimination based on educational qualifications does not violate Title 7, Opinion Letter of October, '65.

*A. C. Thies—for Defendant—Resumed—Cross*

Mr. Belton: We object, Your Honor, on the grounds that that is a legal opinion.

The Court: What Exhibit # is that?

[244] Clerk Vaughn: 5.

The Court: Let the record show that the Court receives into the evidence Defendant's Exhibit 5—that the Plaintiffs object to the receipt into the evidence of this Exhibit and except to the rule of the Court.

(Defendant's Exhibit #5 was marked for identification and received into evidence.)

Mr. Ferguson: Your Honor, I don't know that I have offered or you have received into evidence all of my Exhibits, but I now offer into evidence, Exhibits 1 through 5, just for the record.

The Court: Now, we are talking about Exhibits—Defendant's Exhibits 1, 2, 3, and 4. Are there objections that you want to register, Mr. Belton, to the Exhibits?

Mr. Belton: No objection, Your Honor.

The Court: All right. Let the record show that Defendant's Exhibits 1, 2, 3, and 4 are received into the evidence.

(Defendant's Exhibits #1, #2, #3, and #4 were received into the evidence and #1 was marked for identification.)

Mr. Ferguson: You have already received #5, I take it?

The Court: Yes, we just made an entry.

[245] Mr. Ferguson: All right, sir. The Defendant has nothing further. I would like to be heard

*Motion to Dismiss*

on the motion, if I could presume on the Court's good nature for 5 minutes. I assume you would know what the motion would be. We move—

The Court: All right.

Mr. Ferguson: We move that the Court dismiss this action.

The Court: Let me state this to you before you get to this. I am not insisting that you all present oral argument. I am just before dictating a memorandum that you will give me proposed findings of fact and conclusions of law, providing that you may present briefs and give you ample time, and then, to make inquiry as to whether you wanted oral argument or not, and I am not trying to cut you off, but should you want later, oral argument, it can be set forth at—let's see what the Plaintiff says about it. Are you all going to want oral argument? If not, maybe you would want it later?

Mr. Ferguson: I don't see how Your Honor today can really rule on my motion to dismiss, because really, the record hasn't jelled to the extent that you could do so, and I realize that you would have to hold your ruling in abeyance.

[246] The Court: You could present that in your brief or however you wished.

Mr. Ferguson: Yes, sir, I would like the opportunity to do that and he will present it by a brief or oral argument as the Court deems fit to have—

The Court: All right.

Mr. Ferguson: I do want the motion made for the record.

Mr. Belton: On the question of oral argument, we would like to state at this time, that we would like

*Motion to Dismiss*

to take the advantage of the opportunity, if oral argument is presented. However, it might be that after we get into the job of briefing and writing, we might—

The Court: All right, state your motion for the record, then, Mr. Ferguson.

Mr. Ferguson: We move to dismiss, based on the grounds that the Plaintiff has failed to shoulder the burden of proof with respect to showing the intention of discrimination or the intentional aspects of the discriminatory acts as alleged in the complaint.

The Court: Let the record show that the Court defers its ruling on the motion of the Defendant until after proposed findings of fact and conclusions of law have been presented in brief to the Court.

(END OF CASE)



**Opinion of the United States Court of Appeals**

**IN THE  
UNITED STATES COURT OF APPEALS**

**FOR THE FOURTH CIRCUIT**

**No. 13,013**

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**WILLIE S. GRIGGS, et al.,**

*Plaintiff-Appellant,*

**versus**

**DUKE POWER COMPANY,**

*Defendant-Appellee.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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**(January 9, 1970)**

**Before**

**SOBELOFF, BOREMAN, and BRYAN,**

**Circuit Judges.**

**BOREMAN, Circuit Judge:**

Present Negro employees of the Dan River Steam Station of Duke Power Company in Draper, North Carolina, in a class action with the class defined as themselves and those Negro employees who subsequently may be employed at the Dan River Steam Station and all Negroes who may hereafter seek employment at the station, appeal from a judgment of the district court dismissing their complaint brought under Title VII of the Civil Rights Act of 1964.

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(Duke Power Company will be referred to sometimes as Duke or the company.) The plaintiffs challenge the validity of the company's promotion and transfer system, which involves the use of general intelligence and mechanical ability tests, alleging racial discrimination and denial of equal opportunity to advance into jobs classified above the menial laborer category.

Duke is a corporation engaged in the generation, transmission and distribution of electric power to the general public in North Carolina and South Carolina. At the time this action was instituted, Duke had 95 employees at its Dan River Station, fourteen of whom were Negroes, thirteen of whom are plaintiffs in this action. The work force at Dan River is divided for operational purposes into five main departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The positions of Watchman, Clerk and Storekeeper are in a miscellaneous category.

The employees in the Operations Department are responsible for the operation of the station's generating equipment, such as boilers, turbines, auxiliary and control equipment, and the electrical substation. They handle also interconnections between the station, the company's power system, and the systems of other power companies.

The Maintenance Department is responsible for maintenance of all the mechanical and electrical equipment and machinery in the plant.

Technicians working in the Laboratory Department analyze water to determine its fitness for use in the boilers and run analyses of coal samples to ascertain the quality of the coal for use as fuel in the power station. Test Department personnel are responsible for the performance of the station by maintaining the accuracy of instruments, gauges and control devices.

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Employees in the Coal Handling Department unload, weigh, sample, crush, and transport coal received from the mines. In so doing, they operate diesel and electrical equipment, bulldozers, conveyor belts, crushers and other heavy equipment items. They must be able to read and understand manuals relating to such machinery and equipment.

The Labor Department provides service to all other departments and is responsible generally for the janitorial services in the plant. Its employees mix mortar, collect garbage, help construct forms, clean bolts, and provide the necessary labor involved in performing other miscellaneous jobs. The Labor Department is the lowest paid, with a maximum wage of \$1.565 per hour, which is less than the minimum of \$1.705 per hour paid to any other employee in the plant. Maximum wages paid to employees in other departments range from \$3.18 per hour to \$3.65 per hour.

Within each department specialized job classifications exist, and these classifications constitute a line of progression for purposes of employee advancement. Promotions within departments are made at Dan River as vacancies occur. Normally, the senior man in the classification directly below that in which the vacancy occurs will be promoted, if qualified to perform the job. Training for promotions within departments is not formalized, as employees are given on-the-job training within departments. In transferring from one department to another, an employee usually goes in at the entry level; however, at Dan River an employee is potentially able to move into another department above the entry level, depending on his qualifications.

In 1955, approximately nine years prior to the passage of the Civil Rights Act of 1964 and some eleven years prior

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to the institution of this action, Duke Power initiated a new policy as to hiring and advancement; a high school education or its equivalent was thenceforth required for all new employees, except as to those in the Labor Department. The new policy also required an incumbent employee to have a high school education or its equivalent before he could be considered for advancement from the Labor Department or the position of Watchman into Coal Handling, Operations or Maintenance or for advancement from Coal Handling into Operations or Maintenance. The company claims that this policy was instituted because it realized that its business was becoming more complex and that there were some employees who were unable to adjust to the increasingly more complicated work requirements and thus unable to advance through the company's lines of progression.

The company subsequently amended its promotion and transfer requirements by providing that an employee who was on the company payroll prior to September 1, 1965, and who did not have a high school education or its equivalent, could become eligible for transfer or promotion from Coal Handling, Watchman or Labor positions into Operating, Maintenance or other higher classified jobs by taking and passing two tests, known as the Wonderlic general intelligence test and the Bennett Mechanical AA general mechanical test, with scores equivalent to those achieved by an average high school graduate. The company admits that this change was made in response to requests from employees in Coal Handling for a means of escape from that department but the same opportunity was also provided for employees in the Labor Department.

Until 1966, no Negro had ever held a position at Dan River in any department other than the Labor Department. On August 6, 1966, more than a year after July 2,

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1965, the effective date of the Civil Rights Act of 1964, the first Negro was promoted out of the Labor Department, as Jesse C. Martin (who had a high school education) was advanced into Coal Handling. He was subsequently promoted to utility operator on March 18, 1968. H. E. Martin, a Negro with a high school education, was promoted to Watchman on March 19, 1968, and subsequently to the position of Learner in Coal Handling. Another Negro, R. A. Jumper, was promoted to Watchman and then to Trainee for Test Assistant on May 7, 1968. These three were the only Negroes employed at Dan River who had high school educations. Recently, another Negro, Willie Boyd, completed a course which is recognized and accepted as equivalent to a high school education; thereby he became eligible for advancement under current company policies. Insufficient time has elapsed in which to determine whether or not Boyd will be advanced without discrimination, but it does appear that the company is not now discriminating in its promotion and transfer policies against Negro employees who have a high school education or its equivalent.

The plaintiff Negro employees admit that at the present time Duke has apparently abandoned its policy of restricting all Negroes to the Labor Department; but the plaintiffs complain that the educational and testing requirements preserve and continue the effects of Duke's past racial discrimination, thereby violating the Civil Rights Act of 1964.<sup>1</sup>

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<sup>1</sup> Pertinent sections of Title VII of the Civil Rights Act of 1964 are:

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

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The district court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Negroes were relegated to the Labor Department and deprived of access to other departments by reason of racial discrimination practiced by the company. This finding is fully supported by the evidence.

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to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000e-2(h):

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice.)

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However, the district court also held that Title VII of the Civil Rights Act of 1964 does not encompass the present and continuing effects of past discrimination. This holding is in conflict with other persuasive authority and is disapproved. While it is true that the Act was intended to have prospective application only, relief may be granted to remedy present and continuing effects of past discrimination. *Local 53 v. Vogler*, 407 F.2d 1047, 1052 (5 Cir. 1969); *United States v. Local 189*, 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd*, No. 25956, — F.2d. — (5 Cir. 1969); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968). See, *United States v. Hayes International Corporation*, No. 26809, — F.2d — (5 Cir. 1969), 38 L.W. 2149 (Sept. 16, 1969). In *Quarles*, it was directly held that present and continuing consequences of past discrimination are covered by the Act, the court stating, "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles v. Philip Morris, Inc.*, *supra* at 516. The *Quarles* decision was expressly approved and followed in *United States v. Local 189*, *supra*, as the district court, with subsequent approval of the Fifth Circuit Court of Appeals, struck down a seniority system which had the effect of perpetuating discrimination. "... [W]here, as here, 'job seniority' operates to continue the effects of past discrimination, it must be replaced \* \* \*." *United States v. Local 189*, *supra* at 45. In *Local 53 v. Vogler*, 407 F.2d 1047, 1052 (5 Cir. 1969), the court said: "Where necessary to ensure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination."

Those six Negro employee-plaintiffs without a high school education or its equivalent who were discrimina-

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torily hired only into the Labor Department prior to Duke's institution of the educational requirement in 1955 were simply locked into the Labor Department by the adoption of this requirement. Yet, on the other hand, many white employees who likewise did not have a high school education or its equivalent had already been hired into the better departments and were free to remain there and be promoted or transferred into better, higher paying positions. Thus, it is clear that those six plaintiff Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief; the educational requirement shall not be invoked as an absolute bar to advancement, but must be waived as to these plaintiffs and they shall be entitled to nondiscriminatory consideration for advancement to other departments if and when job openings occur.

Likewise, as to these same six Negro plaintiffs, the testing requirements established in 1965 are also discriminatory. The testing requirements, as will be fully explained later in this opinion, were established as an approximate equivalent to a high school education for advancement purposes. Since the adoption of the high school education requirement was discriminatory as to these six Negro employees and the tests are used as an approximate equivalent for advancement purposes, it must follow that the testing requirements were likewise discriminatory as to them. These six plaintiffs had to pass these tests in order to escape from the Labor Department while their white counterparts, many of whom also did not have a high school education, had been hired into departments other than the Labor Department and therefore were not required to take the tests. Therefore, as to these six plaintiffs, the testing requirements must also be waived and shall not be invoked as a bar to their advancement.



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Next, we consider the rights of the second group of plaintiffs, those four Negro employees without a high school education or its equivalent who were hired into the Labor Department after the institution of the educational requirement. We find that they are not entitled to relief for the reasons to be hereinafter assigned. In determining the rights of this second group of plaintiffs, it is necessary to analyze and determine the validity of Duke's educational and testing requirements under the Civil Rights Act of 1964. We have found no cases directly in point. The Negro employee-plaintiffs contend that the requirements continue the effects of past discrimination and, therefore, must be struck down as invalid under the Act. We find ourselves unable to agree with that contention.

Plaintiffs claim that Duke's educational and testing requirements are discriminatory and invalid because: (1) there is no evidence showing a business need for the requirements; (2) Duke Power did not conduct any studies to discern whether or not such requirements were related to an employee's ability to perform his duties; and (3) the tests were not job-related, and § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), requires tests to be job-related in order to be valid.

The company admits that it initiated the requirements without making formal studies as to the relationship or bearing such requirements would have upon its employees' ability to perform their duties. But, Duke claims that the policy was instituted because its business was becoming more complex, it had employees who were unable to grasp situations, to read, to reason, and who did not have an intelligence level high enough to enable them to progress upward through the company's line of advancement.

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Pointing out that it uses an intracompany promotion system to train its own employees for supervisory positions inside the company rather than hire supervisory personnel from outside, Duke claims that it initiated the high school education requirement, at least partially, so that it would have some reasonable assurance that its employees could advance into supervisory positions; further, that its educational and testing requirements are valid because they have a legitimate business purpose, and because the tests are professionally developed ability tests, as sanctioned under § 703(h) of the Act, 42 U.S.C. 2000e-2(h).

In examining the validity of the educational and testing requirements, we must determine whether Duke had a valid business purpose in adopting such requirements or whether the company merely used the requirements to discriminate. The plaintiffs claim that centuries of cultural and educational discrimination have placed Negroes at a disadvantage in competing with whites for positions which involve an educational or testing standard and that Duke merely seized upon such requirements as a means of discrimination without a business purpose in mind. Plaintiffs have admitted in their brief that an employer is permitted to establish educational or testing requirements which fulfill genuine business needs and that such requirements are valid under the Act. In support of this statement, we quote verbatim from appellants' brief:

*"An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. For example, an employer may require a fair typing test of applicants for secretarial positions. It may well be that, because of long-standing inequality in educational and cultural opportunities available to Negroes, proportionately fewer Negro applicants than*

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*white can pass such a test. But where business need can be shown, as it can where typing ability is necessary for performance as a secretary, the fact that the test tends to exclude more Negroes than whites does not make it discriminatory. We do not wish even to suggest that employers are required by law to compensate for centuries of discrimination by hiring Negro applicants who are incapable of doing the job. But when a test or educational requirement is not shown to be based on business need, as in the instant case, it measures not ability to do a job but rather the extent to which persons have acquired educational and cultural background which has been denied to Negroes."* (Emphasis added.)

Thus, plaintiffs would apparently concede that if Duke adopted its educational and testing requirements with a genuine business purpose and without intent to discriminate against future Negro employees, such requirements would not be invalidated merely because of Negroes' cultural and educational disadvantages due to past discrimination. Although earlier in this opinion we upheld the district court's finding that the company had engaged in discriminatory hiring practices prior to the Act and we concluded also that the educational and testing requirements adopted by the company continued the effects of this prior discrimination as to employees who had been hired prior to the adoption of educational requirement, it seems reasonably clear that this requirement did have a genuine business purpose and that the company initiated the policy with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement.

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This conclusion would appear to be not merely supported, but actually compelled, by the following facts:

(1) Duke had long ago established the practice of training its own employees for supervisory positions rather than bring in supervisory personnel from outside.<sup>2</sup>

(2) Duke instituted its educational requirement in 1955, nine years prior to the passage of the Civil Rights Act of 1964 and well before the civil rights movement had gathered enough momentum to indicate the inevitability of the passage of such an act.<sup>3</sup>

(3) Duke has, by plaintiffs' own admission, discontinued the use of discriminatory tactics in employment, promotions and transfers.<sup>4</sup>

(4) The company's expert witness, Dr. Moffie, testified that he had observed the Dan River operation; had observed personnel in the performance of jobs; had studied the written summary of job duties; had spent several days with company representatives discussing job content; and he concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications. This testimony is uncontroverted in the record.

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<sup>2</sup>The company had an obvious business motive and objective in establishing the high school requirement, that is, hiring only personnel who had a reasonable expectation of ascending promotional ladders into supervisory positions thereby eliminating road blocks which would interfere with movement to higher classifications and tend to decrease efficiency and morale throughout the entire work force.

<sup>3</sup>It is highly improbable that the company seized upon such a requirement merely for the purpose of continuing discrimination.

<sup>4</sup>This tends to demonstrate the company's good faith.

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(5) When the educational requirement was adopted it adversely affected the advancement and transfer of white employees who were Watchmen or were in the Coal Handling Department as well as Negro employees in the Labor Department.<sup>5</sup>

(6) Duke has a policy of paying the major portion of the expenses incurred by an employee who secures a high school education or its equivalent. In fact, one of the plaintiffs recently obtained such equivalent, the company paying seventy-five percent of the cost.<sup>6</sup>

Next, we consider the testing requirements to determine their validity and we conclude that they, too, are valid under § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). In pertinent part, § 703(h) reads: " \* \* \* nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin."

There is no evidence in the record that there is any discrimination in the administration and scoring of the tests. Nor is there any evidence that the tests are not professionally developed. The company's expert, Dr. D. J. Moffie, testified that in his opinion the tests were professionally developed and are reliable and valid; that they are "low

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<sup>5</sup> It is unreasonable to charge the company with prospective discrimination by instituting an educational requirement which was to be applied prospectively to white, as well as Negro, employees.

<sup>6</sup> It would be illogical to conclude that Duke established the educational requirement for purposes of discrimination when it was willing to pay for the education of incumbent Negro employees who could thus become eligible for advancement.

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level" tests and are given at Dan River by one who has had special training in the administration of such tests. The minimum acceptable scores used by the company are approximately those achieved by the average high school graduate, which fact indicates that the tests are accepted as a substitute for a high school education. The evidence disclosed that the minimum acceptable scores used by Duke are Wonderlic-20, and Bennett Mechanical-39; the score of the average high school graduate, i.e., the fiftieth percentile, is 21.9 for the Wonderlic, nearly two points higher than the score accepted by Duke, and 39 for the Bennett Mechanical.

The plaintiffs claim that tests must be *job-related* in order to be valid under § 703(h). The Equal Employment Opportunity Commission which is charged with administering and implementing the Act supports plaintiffs' view. The EEOC has ruled that tests are unlawful " \* \* \* in the absence of evidence that the tests are properly related to specific jobs and have been properly validated \* \* \* ." *Decision of EEOC*, December 2, 1966, reprinted in CCH, *Employment Practices Guide*, ¶ 17,304.53. The EEOC's position has been supported by two federal district courts. *United States v. H. K. Porter*, 59 L.C. ¶ 9204 (M.D. Ala. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968). In *Dobbins* the court invalidated a test which was being given for membership in a labor union or in connection with a referral system because it was not adequately related to job performance needs. However, in that case it was clear that the testing requirement was not one of business necessity and the reasons for adopting such a requirement compellingly indicated that the purpose of such requirement was discrimination, which is not true in the present case.

The court below held that the tests given by Duke were not job-related, but then refused to give weight to the

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EEOC ruling that tests must be job-related in order to be valid under § 703(h). The plaintiffs assert that such refusal was error. It has been held that the interpretation given a statute by an agency which was established to administer the statute is entitled to great weight. *Udall v. Tallman*, 380 U.S. 1, 15 (1965). This principle has been applied to EEOC interpretations given the Civil Rights Act of 1964. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5 Cir. 1969); *Cox v. United States Gypsum Co.*, 284 F. Supp. 74, 78 (N.D. Ind. 1968); *International Chemical Workers Union v. Planters Manufacturing Co.*, 259 F. Supp. 365, 366 (N.D. Miss. 1966). Plaintiffs cite these cases last mentioned above to support their argument that this court should adopt the EEOC ruling that tests must be job-related in order to be valid. However, none of these cases stands for the proposition that an EEOC interpretation is binding upon the courts; in fact, in *International Chemical Workers*, *supra* at 366, it was held that such interpretations of the EEOC are "• • • not conclusive on the courts • • •." We cannot agree with plaintiffs' contention that such an interpretation by EEOC should be upheld where, as here, it is clearly contrary to compelling legislative history and, as will be shown, the legislative history of § 703(h) will not support the view that a "professionally developed ability test" *must* be job-related.

The amendment which incorporated the testing provision of § 703(h) was proposed in modified form by Senator Tower, who was concerned about a then-recent finding by a hearing examiner for the Illinois Fair Employment Practices Commission in a case involving Motorola, Inc. The examiner had found that a pre-employment general intelligence test which Motorola had given to a Negro applicant for a job had denied the applicant an equal employment



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opportunity because Negroes were a culturally deprived or disadvantaged group. In proposing his original amendment, essentially the same as the version later unanimously accepted by the Senate, Senator Tower stated:

"It [the amendment which, in substance, became the ability testing provision of § 703(h)] is an effort to protect the system whereby employers give *general ability and intelligence tests to determine the trainability of prospective employees*. The amendment arises from my concern about what happened in the Motorola FEPC case \* \* \*.

"Let me say, only, in view of the finding in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of Title VII, might attempt to regulate the use of tests by employers \* \* \*.

*"If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person to do a job."* (Emphasis added.) 110 Congressional Record 13492, June 11, 1964.

The discussion which ensued among members of the Senate reveals that proponents and opponents of the Act agreed that general intelligence and ability tests, if fairly administered and acted upon, were not invalidated by the Civil Rights Act of 1964. See, 110 Congressional Record 13503-13505, June 11, 1964.

The "Clark-Case" interpretative memorandum pertaining to Title VII fortifies the conclusion that Congress did



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not intend to invalidate an employer's use of bona fide general intelligence and ability tests. It was stated in said memorandum:

"There is no requirement in Title VII that employers abandon bona fide qualification tests *where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups*. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." (Emphasis added.) 110 Congressional Record 7213, April 8, 1964.

When Senator Tower called up his modified amendment, which became the ability testing provision of §703(h), Senator Humphrey—one of the leading proponents and the principal floor leader of the fight for passage of the entire Act—stated:

"I think it should be noted that the Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and found it to be in accord with the intent and purpose of that title.

"I do not think there is any need for a rollcall. We can expedite it. *The Senator has won his point.*

"I concur in the amendment and ask for its adoption." (Emphasis added.) 110 Congressional Record 13724, June 13, 1964.

At no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill re-

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quired by a specific job or group of jobs. In fact, the legislative history would seem to indicate clearly that Congress was actually trying to guard against such a result. An amendment requiring a "direct relation" between the test and a "particular position" was proposed in May 1968,<sup>7</sup> but was defeated. We agree with the district court that a test does not have to be job-related in order to be valid under § 703(h).<sup>8</sup>

Having determined that Duke's educational and testing requirements were valid under Title VII, we reach the conclusion that those four Negro employees without a high school education who were hired after the adoption of the educational requirement are not entitled to relief. These employees were hired subject to the educational requirement; each accepted a position in the Labor Department with his eyes wide open. Under this valid educational requirement these four plaintiffs could have been hired only in the Labor Department and could not have been promoted or advanced into any other department, irrespective of race, since they could not meet the requirement. Consequently, it could not be said that they have been discriminated against. Furthermore, since the testing requirement is being applied to white and Negro employees alike

<sup>7</sup> Senate Report No. 1111, May 8, 1968.

<sup>8</sup> This decision is not to be construed as holding that *any* educational or testing requirement adopted by *any* employer is valid under the Civil Rights Act of 1964. There must be a genuine business purpose in establishing such requirements and they cannot be designed or used to further the practice of racial discrimination. Future cases must be decided on the bases of their own fact situations in light of pertinent considerations such as the company's past hiring and advancement policies, the time of the adoption of the requirements, testimony of experts and other evidence as to the business purpose to be accomplished, and the company's stated reasons for instituting such policies.

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as an approximate equivalent to a high school education for advancement purposes, neither is it racially discriminatory.

Once we have determined that certain of the plaintiffs are entitled to relief the next question for consideration is the nature and extent of relief to be provided.<sup>9</sup> Those six Negro employees without a high school education or its equivalent who were hired prior to the initiation of the educational requirement are entitled to injunctive relief under § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).<sup>10</sup> The educational and test requirements are

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<sup>9</sup> The plaintiffs disclaim any request for or entitlement to relief other than by way of injunction. Had there been an issue as to monetary awards for damages to those plaintiffs found to have been the victims of racial discrimination, there would have been presented the further issue as to the date of applicability of the Act. There were only 95 employees at the Dan River plant when the Act became effective on July 2, 1965, but Duke Power Company then employed some 6,000 persons throughout its entire system. The Act was initially applicable to employers with 100 or more employees, and it did not become applicable to employers with 75 to 100 employees until July 2, 1966. However, since the relief requested and awarded is solely injunctive in nature no question as to the applicability date of the Act is presented for decision.

<sup>10</sup> Section 706(g) of the Civil Rights Act of 1964 limits injunctive relief to situations in which an employer or a union has "intentionally engaged in or is intentionally engaging in" an unlawful employment practice. While we have found Duke's educational and testing requirements valid as to employees hired subsequently to the adoption of the educational requirement, we further conclude that Duke had intentionally engaged in discriminatory hiring practices in earlier years long prior to the enactment of the Civil Rights Act of 1964 and that, as to those six Negro employees hired prior to the adoption of the educational requirement, the effects of this discrimination were continued. Thus, these six plaintiffs may be granted appropriate injunctive relief under § 706(g). See, *Clark v. American Marine Corp.*, No. 16315, — F. Supp. — (E.D. La. Sept. 15, 1969); *Local 189 v. United States*, No. 25956, — F.2d — (5 Cir. July 28, 1969).

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invalid as applied to their eligibility for transfer and promotion. Thus, on remand, the district court should award proper injunctive relief to insure that these six employees are considered for any future openings without being subject to the educational or testing requirements. This will work no hardship upon the company since the relief provided will simply require it to consider those Negro employees equally with similarly situated white employees, many of whom do not have a high school education or its equivalent. If a Negro employee is advanced to a job in one of the better departments and his inability to perform the duties of the job is demonstrated after a reasonable period the company will be justified in returning him to his previous position or placing him elsewhere. As Judge Butzner said in *Quarles*, 279 F.Supp. 505, 521 (E.D. Va. 1968), *supra*:

"If any transferee fails to perform adequately within a reasonable time . . . he may be removed and returned to the department and job classification from which he came, or to another higher job classification for which the company may believe him fitted."

In granting relief, the district court should order that seniority rights of the six Negro employees who are victims of discrimination be considered on a plant-wide, rather than a departmental, basis. To apply strict departmental seniority would result in the continuation of present effects of past discrimination whenever one of the six is considered in the future for advancement to a vacant job in competition with a white employee who has already gained departmental seniority in a better department as a result of past discriminatory hiring practices. In *United States*

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v. *Local 169*, 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd*, No. 25956, — F.2d — (5 Cir. 1969), *supra*, the court held:

“Where a seniority system has the effect of perpetrating discrimination, and concentrating or ‘telescoping’ the effect of past discrimination against Negro employees into the *present* placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system.”<sup>11</sup>

It is to be understood and remembered that there are thirteen named Negro plaintiffs who bring this action. Jesse C. Martin, a Negro formerly employed in the Labor Department who had a high school education, was advanced to a higher position subsequent to the effective date of the Act. He is not joined as a plaintiff since the past discrimination against him has been removed. This case is now moot as to two of the named Negro plaintiffs who have high school educations and have been advanced; also as to Willie Boyd, who has acquired the equivalent of a high school education and is now eligible for advancement.

Briefly summarizing, only those six Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief. As to them the judgment below is reversed and the case is remanded to the district court

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<sup>11</sup> Here, despite the company's representations to the contrary, it is apparent that strict departmental seniority is not always followed since the company admits that an employee sometimes enters a new department at a position *above* the entry level; however, it is the more general practice for an employee to enter a new department at the lowest classification therein.

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with directions to fashion appropriate injunctive relief consistent with this opinion. As to the remaining Negro plaintiffs the judgment below is affirmed.

Affirmed in part,  
reversed in part,  
and remanded.

SOBELOFF, Circuit Judge, concurring in part and dissenting in part:

The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years. For that reason and because the prevailing opinion puts this circuit in direct conflict with the Fifth,<sup>1</sup> I find it appropriate to set forth my views in some detail.

While I concur in the grant of relief to six of the plaintiffs, I dissent from the majority opinion insofar as it upholds the Company's educational and testing requirements and denies relief to four Negro employees on that basis.

The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified.<sup>2</sup> This is not the first time the federal courts of our circuit have been exposed to this problem. In what has become a leading case, Judge Butzner of our court, sitting

<sup>1</sup> Local 189 v. United States, — F.2d —, 71 LRRM 3070, 3081 (5th Cir., July 28, 1969), discussed at note 8, *infra*.

<sup>2</sup> See generally Cooper and Sobel, Seniority and Testing Under Fair Employment Laws, A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (June 1969) [hereinafter cited as Cooper and Sobel]; Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Col. L. Rev. 691 (April 1968).

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as a district judge by designation, authoritatively dealt with the question of the denial of jobs to blacks because of a seniority system built upon a pattern of past discrimination. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). Today we are faced with an analogous issue, namely, the denial of jobs to Negroes who cannot meet educational requirements or pass standardized tests, but who quite possibly have the ability to perform the jobs in question. On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.

The pattern of racial discrimination in employment parallels that which we have witnessed in other areas. Overt bias, when prohibited, has oftentimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before. Illustrative is the use of the Grandfather Clause in voter registration—a scheme that was condemned by the Supreme Court without dissent over a half century ago. *Guinn v. United States*, 238 U.S. 347 (1915).<sup>3</sup> Another illustration is the resort to pupil transfer plans to nullify rezoning which would otherwise serve to desegregate school districts. Again, the illusory even-handedness did not shield the artifice from attack; the Supreme Court unanimously repudiated the plan. *Goss v. Bd. of Education*, 373 U.S. 683 (1963). It is long recognized constitutional doctrine that “sophisticated as well as simple-minded modes of discrimination” are prohibited. *Lane v. Wilson*, 307 U.S.

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<sup>3</sup> The opinion was unanimous save for Mr. Justice McReynolds, who took no part in the consideration or decision of the case.

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268, 275 (1938) (Frankfurter, J.). We should approach enforcement of the Civil Rights Act in the same spirit.<sup>4</sup>

In 1964 Congress sought to equalize employment opportunity in the private sector. Title VII, § 703(a) of the 1964 Civil Rights Act provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employ-

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<sup>4</sup> It is not part of my contention that the defendant in the present case availed himself of "objective" employment procedures deliberately to evade the strictures of Title II. As will be developed, an employer's state of mind when he adopts the standards is irrelevant when the effect of his actions is not different from purposeful discrimination. At any rate, it is my view that the majority's construction of Title VII will invite many employers to seize on such measures as tools for their forbidden designs.



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ment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end. *Quarles v. Philip Morris, supra*; *Local 189 v. United States*, — F.2d —, 71 LRRM 3070 (5th Cir. July 28, 1969); *Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). For example, a requirement that all applicants for employment shall have attended a particular type of school would seem racially neutral. But what if it develops that the specified schools were open only to whites, and if, moreover, they taught nothing of particular significance to the employer's needs? No one can doubt that the requirement would be invalid. It is the position of the Equal Employment Opportunities Commission (EEOC) that educational or test requirements which are irrelevant to job qualifications and which put blacks at a disadvantage are similarly forbidden.

I

*Use of Non-Job-Related  
Educational and Testing Standards*

The Dan River plant of the Duke Power Company is organized into five departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. There is also a miscellaneous category which includes watchmen. Until 1965 blacks were routinely relegated to the all-Negro Labor Department as part of a policy of overt discrimination.

The era of outrightly acknowledged bias at Duke Power is admittedly at an end. However, plaintiffs contend that administration of certain "objective" transfer criteria have accomplished substantially the same result. It was not until August 1966 that any Negro was promoted out of the Labor Department. Altogether, as of this date, three blacks

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have advanced from that department. They were the only ones that could measure up to the Company's requisites for transfer.<sup>5</sup>

In 1955 the Company first imposed its educational requirement: a high school diploma (or successful completion of equivalency ["GED"] tests) would be necessary to progress from any of the outside departments (Labor, Coal Handling, Watchmen) to any of the inside departments (Operations, Maintenance, Laboratory and Test) or from Labor to the two other outside classifications. In 1965 the Company provided that in lieu of a high school diploma or equivalent, employees could satisfy the transfer standards by passing two "general intelligence" tests, the 12 minute "Wonderlic" test and the 30 minute "Bennett Mechanical AA" test. It is uncontroverted that all of these requirements are equivalent.

*A. The Necessity for Job-Relatedness*

Whites fare overwhelmingly better than blacks on all the criteria,<sup>6</sup> as evidenced by the relatively small promotion

<sup>5</sup> At oral argument we were told that one other black has since qualified but has not yet been transferred.

<sup>6</sup> No one seriously questions the fact that, in general, whites register far better on the Company's alternative requirements than blacks. The reasons are not mysterious.

*High School Education.* In North Carolina, census statistics show, as of 1960, while 34% of white males had completed high school, only 12% of Negro males had done so. On a gross level, then, use of the high school diploma requirement would favor whites by a ratio of approximately 3 to 1.

*Standardized Tests.* It is generally known that standardized aptitude tests are designed to predict future ability by testing a cumulation of acquired knowledge.

In other words, an aptitude test is necessarily measuring a student's background, his environment. It is a test of his

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rate from the Labor Department since 1965. Therefore, the EEOC contends that use of the standards as conditions for transfer, unless they have significant relation to performance on the job, is improper. The requirements, to withstand attack, must be shown to appraise accurately those characteristics (and only those) necessary for the job or jobs an employee will be expected to perform. In others, the standards must be "job-related."

Plaintiffs and the Commission are not asking, as the majority implies, that blacks be accorded favored treatment in order to remedy centuries of past discrimination. That many members of the long disfavored group find themselves ill equipped for certain employments is a burden which the 1964 Civil Rights Act does not seek to lift. The argument is only that educational and cultural differences caused by that history of deprivation may not be fastened on as a test for employment when they are irrelevant to the issue of whether the job can be adequately performed.

Duke Power, on the other hand, maintains that its selection standards are unimpeachable since in its view the

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cumulative experiences in his home, his community and his school.

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, — F.2d — (D.C. Cir. 1969) (en banc).

Since for generations blacks have been afforded inadequate educational opportunities and have been culturally segregated from white society, it is no more surprising that their performance on "intelligence" tests is significantly different than whites' than it is that fewer blacks have high school diplomas. In one instance, for example, it was found that 58% of whites could pass a battery of standardized tests, as compared with only 6% of the blacks. Included among those tests were the Wonderlic and Bennett tests. Decision of EEOC, cited in CCH Empl. Prac. Guide ¶1209.25 (Dec. 2, 1966).

For a comprehensive analysis of the impact of standardized tests on blacks, see Cooper and Sobel, 1638-1641.

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tests (and therefore also the equivalent educational standard) are protected by § 703(h) of Title VII.

Section 703(h) provides, in pertinent part:

• • • nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(h).

The Company asserts that its tests are "professionally developed ability tests" and thus do not have to be job-related. The District Court agreed and rejected the construction put upon § 703(h) by the EEOC. The majority here adopts this view.

In its *Guidelines on Employment Testing Procedures*<sup>7</sup> the Commission has held that a test can be a "professionally developed ability test" only if it

fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.<sup>7a</sup>

<sup>7</sup> Issued September 21, 1966. The *Guidelines* may be found in CCH Empl. Prac. Guide ¶16,904 at 7319.

<sup>7a</sup> The newly appointed chairman of the EEOC, William H. Brown, III, has recently reaffirmed this thesis. In an address on November 26, 1969 he asked representatives of more than forty

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In rejecting the Commission *Guidelines* the District Court erred and the majority repeats the error. Under settled doctrine the Commission's interpretation should be accepted. The Supreme Court has held that

[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153. See also, e.g., *Gray v. Powell*, 314 U.S. 402; *Universal Battery Co. v. United States*, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408.

*Udall v. Tallman*, 380 U.S. 1, 16 (1965). In the *Tallman* case, the Court found that a construction of an Executive Order made by the Secretary of the Interior was not unreasonable. Accordingly, it followed the Secretary's interpretation.

*Guidelines* of the EEOC are entitled to similar consideration. The Fifth Circuit agrees. In *Weeks v. Southern Bell*

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trade associations to "review selection and testing procedures to make sure they reflect actual job requirements." 72 LRR 413, 416 (12/8/69).

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*Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir., 1969), that court, in deciding a Title VII sex discrimination case, accorded "considerable weight" to the EEOC guideline which construed the relevant statutory provision. In a more recent case the same court noted the rejection of the EEOC's position by the lower court in the present case and specifically disapproved of the decision here under review.<sup>8</sup> *Local 189 v. United States*, — F.2d —, 71 LRRM 3070, 3081 (July 28, 1969). We should do the same.

Other courts have reached similar results. Granting relief from the effects of a departmental and seniority structure, Judge Butzner found in *Quarles* that "[t]he restrictions do not result from lack of merit or qualification." 279 F. Supp. at 513. The Eighth Circuit has held that "it is essential that journeyman's examinations be objective in nature, that they be designed to test the ability of the applicant to do that work usually required by a journeyman . . ." *United States v. Local 36, Sheet Metal Workers*, — F.2d — (8th Cir. Sept. 16, 1969). *Accord, Dobbins v. Local 112, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968).

Not only is the Commission's interpretation of § 703(h) not unreasonable, but it makes eminent common sense. The Company would have us hold that any test authored by

<sup>8</sup> Judge Wisdom stated that

[The *Griggs* court] went on to strike down an EEOC interpretation of that provision which would limit the exemption to tests that measure ability "required by the particular job or class of jobs which the applicant seeks." . . .

When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes ongoing discrimination, unless the incidents are limited to those that safety and efficiency require. That appears to be the premise for the Commission's interpretation of § 703(h). To the extent that *Griggs* departs from that view, we find it unpersuasive.

71 LRRM at 3081.

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a professional test designer is "professionally developed" and automatically merits the court's blessing. But, what is professionally developed for one purpose is not necessarily so for another. A professionally developed typing test, for example, could not be considered professionally developed to test teachers. Similarly, a test that is adequately designed to determine academic ability, such as a college entrance examination, may be grossly wide of the mark when used in hiring a machine operator. Moreover, the Commission's is the only construction compatible with the purpose to end discrimination and to give effect to § 703(a). Although certainly not so intended, my brethren's resolution of the issue contains a built-in invitation to evade the mandate of the statute. To continue his discriminatory practices an employer need only choose any test that favors whites and is irrelevant to actual job qualifications. In this very case, the Company's oft-reiterated but totally unsubstantiated claim of business need has been deemed sufficient to sustain its employment standards. The record furnishes no supporting evidence, only the defendant's *ipse dixit*.

It would be enough to rest our decision on the reasonableness of the EEOC's position. A deeper look, however, at the legislative history of § 703(h) provides powerful additional support for its construction.

Congressional discussion of employment testing came in the swath of the famous decisions of an Illinois Fair Employment Practices Commission hearing examiner, *Myart v. Motorola*.<sup>9</sup> That case went to the extreme of suggesting that standardized tests on which whites performed better than Negroes could never be used. The decision was

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<sup>9</sup> Decided on February 26, 1964. Reproduced in 110 Cong. Rec. 5662-64 (1964).

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generally taken to mean that such tests could never be justified *even if the needs of the business required them*.

Understandably, there was an outcry in Congress that Title VII might produce a *Motorola* decision. Senators Clark and Case moved to counter that speculation. In their interpretive memorandum they announced that

[t]here is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.<sup>10</sup>

Read against the context of the *Motorola* controversy, the import of the Clark-Case statement plainly appears: employers were not to be prohibited from using tests that determine *qualifications*. "Qualification" implies qualification *for* something. A reasonable interpretation of what the Senators meant, in light of the events, was that nothing in the Act prevents employers from requiring that applicants be fit for the job. Tests for that purpose may be as difficult as an employer may desire.

Senator Tower, however, was not satisfied that a *Motorola* decision was beyond the purview of Title VII as written. He introduced an amendment which had the object of preventing the feared result. His amendment provided that a test, administered to all applicants without regard to race, would be permissible "if . . . in the case of any

<sup>10</sup> 110 Cong. Rec. 7213 (1964).



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individual who is an employee of such employer, such test is designed to determine or predict whether such individual is *suitable or trainable with respect to his employment* [or promotion or transfer] *in the particular business or enterprise involved* \* \* \*." [Emphasis added.]<sup>11</sup> It was emphatically represented by the author that the amendment was "not an effort to weaken the bill"<sup>12</sup> and "would not legalize discriminatory tests"<sup>13</sup> but was offered to stave off an apprehended *Motorola* ruling that might "invalidate tests \* \* \* to determine the professional competence or ability or trainability or suitability of a person *to do a job.*" (Emphasis added.)<sup>14</sup> It is highly noteworthy that

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<sup>11</sup> The amendment was introduced on July 11, 1964. In its entirety it reads:

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—

(1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or

(2) in the case of an individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin.

110 Cong. Rec. 13492 (1964).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 13504.

<sup>14</sup> *Id.* at 13492.

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Senator Tower's exertions were not on behalf of tests unrelated to job qualifications, but his aim was to make sure that job-related tests would be permitted. He squarely disavowed any broader aim.

Senators Case and Humphrey opposed the amendment as redundant.<sup>15</sup> Reiterating the message of the Clark-Case memorandum, Senator Case declared that "[t]he Motorola case could not happen under the bill the Senate is now considering."<sup>16</sup> Senator Case also feared that some of the language in the amendment would be susceptible to misinterpretation.<sup>17</sup> The amendment was defeated.<sup>18</sup>

Two days later Senator Tower offered § 703(h) in its present form, stating that it had been agreed to in principle "[b]ut the language was not drawn as carefully as it should have been."<sup>19</sup> The new amendment was acceptable to the proponents of the bill and it passed.<sup>20</sup>

What does this history denote? It reveals that because of the *Motorola* case there was serious concern that tests that select for job qualifications—job-related tests—might be deemed invalid under Title VII. Senators Clark, Case and Humphrey thought the fear illusory, but Senator Tower

<sup>15</sup> *Id.* at 13503-04.

<sup>16</sup> *Id.* at 13503.

<sup>17</sup> In fact, it appears that Senator Case was concerned that the amendment might be construed the way Duke Power would have us construe the enacted § 703(h).

If this amendment were enacted it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally designed.

*Id.* at 13504.

<sup>18</sup> *Id.* at 13505.

<sup>19</sup> *Id.* at 13724.

<sup>20</sup> *Id.*

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expended great effort to insure against the possibility. At the same time he gave assurance that he did not mean to weaken the Act. His first proposed amendment contained language which contemplated that tests were to be job-related. According to his own formulation tests had to be of such character as to determine whether "an individual is suitable with respect to his employment." At no time was there a clash of opinion over this principle but the amendment was opposed by proponents of the bill for other reasons and was rejected. The final amendment, which was acceptable to all sides could hardly have required less of a job relation than the first.<sup>21</sup> Since job-relatedness was never in dispute there is no room for the inference that the bill in its enacted form embodied a compromise on this point. The conclusion is inescapable that the Commission's construction of § 703(h) is well supported by the legislative history.<sup>22</sup>

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<sup>21</sup> Indeed, the avowed tightening of language by Senator Tower in the interim, n.19, *supra*, was presumably in response to the misgiving expressed by Senator Case that the original amendment could lend itself to the construction that Duke Power now seeks. See n.15, *supra*.

<sup>22</sup> The majority argues that congressional action some years after the passage of the 1964 Act supports the Company's position. This is not legislative history. Even if the import of the action were unequivocal it would not speak for the will of the 88th Congress which passed the statute.

The cited legislative deliberation was occasioned by a bill introduced in May 1968 to modify Title VII. See S. 3465, 90th Cong., 2d Sess. § 6(c) (1968). If adopted it would have amended § 703(h) to embody a job-related standard in express terms. However, the bill was not enacted. One can draw differing and inconsistent conclusions from these events. It could be argued, as the majority does, that the bill's proponents recognized that § 703(h) as it stands does not contemplate job-relation. It is equally possible that the bill ultimately did not pass because the amendment was thought to be unnecessary. The bill's adherents might also have thought that the new amendment would represent no change,

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Manifestly, then, so far as Duke Power relies on § 703(h) for the proposition that its tests (or other requirements) need not be job-related, it must fail.

*B. The District Court's Findings and the Evidence Supporting It.*

There can be no serious question that Duke Power's criteria are not job-related. The District Court expressly found that they were not,<sup>23</sup> and that finding is the only one consistent with the evidence.

To insure that a criterion is suitably fitted to a job or jobs, an employer is called upon to demonstrate that the standard was adopted after sufficient study and evaluation. It is not enough that officials think or hope that a requirement will work. In the District Court, Dr. Richard Barrett

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but offered it to forestall employers, such as Duke Power, from construing § 703(h) incorrectly. The inferences to be drawn from the introduction of the bill and its death are at best ambiguous and inconclusive.

If one must look to subsequent events for elucidation, consideration might be given to the comment of a Senator who was intimately involved in the passage of § 703(h). Senator Humphrey has stated that in his view § 703(h) did not protect tests if they were "irrelevant to the actual job requirements." Letter to American Psychological Association, quoted in *The Ind. Psychologist* (Div. 14, Am. Psychological Ass'n Newsletter), August, 1965, at 6, cited in Cooper and Sobel, 1653, n.67.

<sup>23</sup> The District Judge said:

The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available.

• • •

• • • These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees.

292 F. Supp. 243, 250 (1968).

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was qualified as an expert witness for plaintiff on the "use of tests and other selection procedures for selection in promotion and employment." He testified as to what sound business practice would dictate: First, a careful job analysis should be made, detailing the tasks involved in a job and the precise skills that are necessary. Then, on the basis of this analysis, selection procedures may be chosen that are adapted to the relevant abilities. Then, the most important step is to validate the chosen procedures, that is, to test their results with actual performance.

The EEOC concurs. The *Guidelines* detail methods to be used to develop, study, and validate employment criteria.<sup>24</sup>

Compare with the above what Duke Power has done and what it has failed to do. Company officials say that the high school requirement was adopted because they thought it would be helpful. Indeed, a company executive candidly admitted that

there is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt this was a reasonable requirement  
 . . .

Duke Power offered the testimony of Dr. Dannie Moffie, an expert "psychologist in the field of industrial and per-

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<sup>24</sup> The recommended methods were adopted after study by a panel of psychologists. The Commission has the power "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public[.]" 42 U.S.C. 2000e-4(f)(5).

Also see 33 Fed. Reg. 14392 (1968). By order of the Secretary of Labor, detailed minimum standards of evidence of test validity have been issued for federal contractors. That evidence is reviewed by the Office of Federal Contract Compliance to determine whether or not a contractor has violated Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.), banning racial discrimination.

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sonnel testing." Dr. Moffie agreed that a professionally developed test "should be reliable and \* \* \* should be valid." The question of validity, he said, is whether "the test measures what it has been set up to measure." Dr. Moffie never asserted that the Bennett and Wonderlic tests had been validated for job-relatedness. In fact, he testified that a job-related validity study was begun at the Dan River plant in 1966 but has not yet been completed. What this expert did claim was that the tests had been validated for their express purpose of determining "whether or not a person has the intelligence level and the mechanical ability level that is characteristic of the High School graduate. According to Dr. Moffie,

when [the tests] function as a substitute or in lieu of a High School education, then, the assumption is that the test then,—the High School education is the kind of training and ability and judgment that a person needs to have, in order to do the jobs that we are talking about here \* \* \*.

It is precisely this assumption that is totally unsubstantiated. The tests stand, and fall, with the high school requirement. The testimony does establish that the tests are the equivalent or a suitable substitute for a high school education, but there is an utter failure to establish that they sufficiently measure the capacity of the employee to perform any of the jobs in the inside departments. This is a fatal omission and should mark the end of the story.

*C. The Alleged Business Justification*

But on the majority's theory, there can be business justification in the absence of job-relatedness. The Company's promotion policy has always been to give on-the-job

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training—the next senior man is promoted if, after he tries out on the job, he is found qualified. The Company claims that ten years before the start of this suit it found that, its business having become increasingly complex, employees in the advanced departments “did not have an intelligence level high enough to enable them to progress” in the ordinary line of promotion. It is asserted that in order to ameliorate this situation and to “upgrade the quality of its work force” the Company adopted the high school requirement, and later the alternative tests, as conditions for entry into the desirable inside departments. On these claims the majority grounds its determination of business need.

In fairness to the majority and to the Company, the thrust of this factual presentation is to suggest an argument that does not necessarily disavow job-relatedness. Rather, the rule would be that the jobs for which the tests must be fitted may be jobs that employees will *eventually, rather than immediately*, be expected to fill. However, the plaintiffs and the Commission have neither addressed nor rejected that proposition. Rather, it is their contention, supported by the testing and finding below, that Duke Power has not shown that its educational and testing requirements are related to *any* job.<sup>25</sup>

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<sup>25</sup> The notion that future jobs can be the basis for a test is not inconsistent with the language of the *Guidelines* which speaks of “the applicant’s ability to perform a particular job or class of jobs.” Of course it would be impermissible for an employer to gear his requirements to jobs the availability of which is only a remote possibility. The office of Federal Contract Compliance administers Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.) which bans discrimination by government contractors. That agency has recognized this problem and has provided (by order of the Secretary of Labor) that when a hiring test is based on possible promotion to other jobs, promotion must be probable “within a

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Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks. Thus the majority stresses that the standards were adopted in 1955 when overt discrimination was the general rule, and hence the new policy was obviously not meant to accomplish that end. But this is no answer.

A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race. Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. The law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent. There can be no legitimate business purpose apart from business need; and where no business need is shown, claims to business purpose evaporate.<sup>26</sup>

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reasonable period of time and in a great majority of cases." 33 Fed. Reg. 14392, § 2(b)(1) (1968).

In this case, however, the issue is not the propriety of testing for remote positions. We might assume that once an employee joins the line of progression his advance will be inexorable. Nevertheless, the fact remains that Duke Power's requirements have never been validated for jobs at the end of the ladder, let alone those on the bottom rung.

<sup>26</sup> As I have noted from the outset of this discussion, the ultimate question under Title VII is whether there are business needs for



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It may be accepted as true that Duke Power did not develop its transfer procedures in order to evade Title VII, since in 1955 this enactment could not be foreseen. However, by continuing to utilize them at the present time, it is now evading the Act. And by countenancing the practice, this court opens the door to wholesale evasion. We may be sure that there will be many who will seek to pass through that door.

The Company's claim to business justification is further attenuated by imbalance in the application of the standards. Even if we view the standards as oriented toward future jobs, the fact remains that of those that might apply for such positions in the inside partments, only the outsiders must meet the questioned criteria in order to qualify. Intra-departmental progression remains the same. Also there is apparently no restriction on transfer from any of the inside departments to the other two inside departments. An employee with no more than a fifth grade education who has not taken the tests may try out for new inside jobs and transfer to a vacancy in another department if he is already in an inside department. In spite of Duke Power's vaunted faith in the necessity of a high school education or its equivalent, such an employee may,

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an employer's policy. Plaintiffs agree and the majority properly quotes their brief, adding emphasis:

An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. \* \* \* [W]here business needs can be shown \* \* \* the fact that the test tends to exclude more Negroes than whites does not make it discriminatory.

The statement is correct and certainly does not "concede," as the majority urges, that the question is only whether Duke Power had a "genuine business purpose and [was] without intent to discriminate against future Negro employees \* \* \*."

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without any test, advance as far as his actual talents permit and qualify for higher pay.

The fact that Duke Power has not consistently relied on its standards, especially when viewed in light of the fact that the exempted inside group was constituted when racial discrimination was in vogue, belies the claim to business justification.

In short, Duke Power has not demonstrated how the exigencies of its business warrant its transfer standards. The realities of the Duke Power experience reveal that what the majority seizes upon as business need is in fact no more than the Company's bald assertion. The majority opinion's measure of "genuine business purpose" must be very low indeed, for, after all is said and done, Duke Power has offered no reason for allowing it to continue its racially discriminatory procedures.

## II

*Discriminatory Application of Standards*

As described above, the Company's criteria unfairly apply only to outsiders seeking entrance to the inside departments. This policy disadvantages those who were not favored with the lax criteria used for whites before 1955. As I will show, this when juxtaposed with the history and racial composition of the Dan River plant, is itself sufficient to constitute a violation of Title VII.

It is true, as the majority points out, that the uneven-handed administration of transfer procedures works against some whites as well as blacks. It is also true that unlike the Constitution, Title VII does not prohibit arbitrary classifications generally. Its focus is on racial and other specified types of discrimination. Thus, when an employer

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capriciously favors the inside employees, to the detriment of those employed in the outside departments, this is not automatically an unlawful employment practice if whites as well as blacks are in the disadvantaged class.

On the other hand, it cannot be ignored that while this practice does not constitute forthright racial discrimination, the policy disfavoring the outside employees has primary impact on blacks. This effect is possible only because a history of overt bias caused the departments to become so imbalanced in the first place. The result is that in 1969, four years after the passage of Title VII, Dan River looks substantially like it did before 1965. The Labor Department is all black; the rest is virtually lily-white.

There no longer is room for doubt that a neutral superstructure built upon racial patterns that were discriminatorily erected in the past comes within the Title VII ban. Judge Butzner put the point to rest when he rejected an employer contention that "the present consequences of past discrimination are outside the coverage of the act." In his words, "[i]t is apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 515-16 (E.D. Va. 1968).

A remedy for this kind of wrong is not without precedent. The "freezing" principle (more properly, the anti-freezing principle), developed by the Fifth Circuit in voting cases is analogous. In those cases a pattern and practice of discrimination excluded almost all eligible Negroes from the voting lists but enrolled the vast majority of whites. Faced with judicial attack, the authorities found that they could no longer avowedly employ discriminatory practices. They invented and put into effect instead new,

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unquestionably even-handed, but onerous voting requirements which had the effect of excluding new applicants of both races, but, as was to be expected, primarily affected Negroes, who in the main were the unlisted ones. As the Fifth Circuit explained the principle,

[t]he term "freezing" is used in two senses. It may be said that when illegal discrimination or other practices have worked inequality on a class of citizens and the court puts an end to such a practice but a new and more onerous standard is adopted before the disadvantaged class may enjoy their rights, already fully enjoyed by the rest of the citizens, this amounts to "freezing" the privileged status for those who acquired it during the period of discrimination and "freezing out" the group discriminated against.

*United States v. Duke*, 332 F.2d 759, 768 (5th Cir. 1964). Accordingly, the new voting requirements were struck down. This remedial measure was approved by the Supreme Court in *United States v. Louisiana*, 380 U.S. 145 (1965).

Applying similar reasoning to the Title VII employment context, the Fifth Circuit invalidated the nepotism policy of an all-white union, which restricted new members to relatives of old ones. Although the policy of course discriminated against whites as well as others, it was prohibited since it enshrined the white membership and effectively forever denied membership status to Negroes or Mexican-Americans. *Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).<sup>27</sup>

<sup>27</sup> See also *Houston Maritime Ass'n*, 168 NLRB 83, 66 LRRM 1337 (1967). A union, after having consistently rejected Negroes for membership, adopted a new "freeze" policy whereby all new

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Title VII bars "freeze-outs" as well as pure discrimination, where the "freeze" is achieved by requirements that are arbitrary and have no real business justification. Thus Duke Power's discrimination against *all* those who did not benefit from the pre-1955 rule for whites operates as an illegal "freeze-out" of blacks from the inside departments.

## III

*Conclusion*

Beside the violation found by the majority, Duke Power is guilty of an unlawful employment practice in two other ways. First, it has used non-job-related transfer standards which have the effect of excluding blacks. Second, it has implemented those same standards in a discriminatory fashion so as to freeze blacks out of the inside departments.

This case deals with no mere abstract legal question. It confronts us with one of the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process. We should approach our task of enforcing Title VII with full realization of what is at stake.

For all of the above reasons, the judgment of the District Court should be reversed with directions to grant relief to all of the plaintiffs.

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applicants were turned down, white and black. The Labor Board found that the union violated the National Labor Relations Act.

[B]y adopting a practice which in operative effect created a preferred class in employment, the result was that the Union's previous policy of discrimination against Negroes as to job opportunities solely on the basis of race was continued and maintained.

**Order Allowing Certiorari, June 29, 1970**

**SUPREME COURT OF THE UNITED STATES**

No. 1405—October Term, 1970

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WILLIE S. GRIGGS, *et al.*,

*Petitioner,*

—vs.—

DUKE POWER COMPANY, a corporation,

*Respondent.*

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"The motion of the United Steel Workers of America AFL-CIO, for leave to file a brief, as *amicus curiae*, is granted. The petition for a writ of certiorari is also granted and the case is placed on the summary calendar. Mr. Justice Brennan took no part in the consideration or decision of this motion and petition."

Supreme Court, U.S.

FILED

AUG 13 1970

E. ROBERT SEAVER, CLERK

**EXHIBIT VOLUME**

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**Supreme Court of the United States**

**OCTOBER TERM, 1969 1970**

**No. [REDACTED] 124**

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**WILLIE S. GRIGGS, ET AL.,  
PETITIONERS**

**vs.**

**DUKE POWER COMPANY, A CORPORATION,  
RESPONDENT.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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**PETITION FOR CERTIORARI FILED APRIL 9, 1970**

# EXHIBIT VOLUME

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<i>Exhibit:</i>		1b
1—Charge of Discrimination .....		2b
9—Decision of Equal Opportunity Commis.....		5b
10—Letter dated September 9, 1966 .....		6b
11—Interrogatories .....		16b
Answers to Interrogatories .....		26b
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Employer Information Report EEO-1 .....		in 110b
14—Excerpts from Deposition of Kenneth.....		118b
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31—Dan River Employees' Qualifications .....		
32—Excerpts from Deposition of Lewis P <sup>n</sup> , Robert A. Jumper, C. E. Parcell a <sup>E</sup> . Martin .....		128b
33—Guidelines on Employment Testin <sup>g</sup> ..... dures .....		129b

## DEFENDANT'S EXHIBITS

<i>Exhibit:</i>		
1—Personnel Promotion Policy .....		137b
3—Minimum Occupational Scores .....		138b
4—Test of Mechanical Comprehensio <sup>r</sup> m AA) .....		139b
5—Extracts from EEOC Digest of Le <sup>er</sup> . pretations .....		147b



### CHANGE OF DISCRIMINATION

MAIL Equal Employment Opportunity Commission Case File No.  
TO: 1800 G Street  
Washington, D. C. 20506

YOUR NAME Clarence E. Purcell, Willie Griggs PHONE NO. 623-334

- (1) STREET ADDRESS P. O. Box 204 , Route 1  
CITY Sorey and Draper STATE N. C. ZIP CODE \_\_\_\_\_

- (2) WAS THE DISCRIMINATION BECAUSE OF: (check one) (specify)  
 Race or Religious National  
 x color Creed origin Sex

Who discriminated against you? Give the name and address of the employer, labor organization, employment agency, and/or apprenticeship committee. If more than one, list all.

NAME DUKE POWER COMPANY

- (3) STREET ADDRESS \_\_\_\_\_  
CITY DRAPER STATE NORTH CAROLINA ZIP CODE \_\_\_\_\_  
AND (other parties if any) \_\_\_\_\_

- (4) Have you filed this charge with a state or local government agency? Yes ☒ No ☐

- (5) If your charge is against a Company or a union, how many employees or members? more than Do Not Know  
100  
Number

- (6) The most recent date on which this discrimination took place. Month 8 Day 8 Year 66

Explain what unfair things were done to you: I have sought ad-  
vancement in positions with the Company but have been denied ad-  
vancement because of my race and color. Negro employees tradi-  
tionally have been hired in lower paying jobs and denied the  
right to advance in positions. The Company has maintained  
separate facilities for its Negro and white employees and have  
discriminated against Negro employees in rates and scales of  
pay.

I SWEAR OR AFFIRM THAT I HAVE READ THE ABOVE CHARGE AND THAT IT IS TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

DATE August 24, 1956

(SIGN HERE)

Subscribed and sworn to before me this 10 day of April, 1911.

## Plaintiff's Exhibit 9

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20506

465  
3 copies  
TH  
Justice  
Office

DECISION

Tucker, James S.	Case Nos.	6-3-1852
Martin, Herman E.		6-3-1853
Purcell, William C.		6-3-1854
Jackson, Clarence M.		6-3-1855
Jumper, Robert A.		6-3-1856
Hairston, Lewis H.		6-3-1857
Boyd, Willie R.		6-3-1858
Blackstock, Junior		6-3-1859
Hatchett, John D.		6-3-1860
Purcell, Clarence C.		6-3-1861
Griggs, Willie S.		6-3-1863
-Martin, Jessie C.		6-3-1864
Galloway, Eddie		6-3-1865
-Broadnax, Eddie W.		6-3-1866

Charging Parties

vs.

Duke Power Company  
Draper, North Carolina  
Respondent

Filing Date:	March 15, 1966
Date of Alleged Violation:	Continuing
Date of Service of Charge:	April 26, 1966

SUMMARY OF CHARGE

The charging parties allege discrimination on the basis of race (Negro) as follows:

- a) All Negro employees are restricted to two classifications -- semi-skilled and laborers.
- b) Upgrading requirements for Negro employees are not and were not required for white employees.

Case Nos. 6-3-1851 thru -1861,  
-1863 thru -1866

- c) Locker Rooms, showers, water fountains and toilets are segregated.

#### SUMMARY OF INVESTIGATION

Respondent company provides electric power to area in the southern states. It is a government contractor employing more than 6,000 people in 120 locations and is within the jurisdiction of Title VII.

- 1) Investigation revealed that all 14 Negro employees at respondent location are in menial categories such as coal handling, boiler cleaning, changing oil, etc.
- 2) No Negro earns more than \$1.645 per hour while whites all earn more than \$1.81 per hour.
- 3) Negroes have not progressed in job classification although many have as much as 20 years seniority.
- 4) Respondent asserts that there have been no vacancies in the next highest classifications to which charging parties can progress.
- 5) Many white employees have been upgraded since the effective date of Title VII.
- 6) Negroes have been limited to a progression line for semi-skilled or common laborers.
- 7) Company officials assert that there has been no upgrading of any employee who has not passed the testing program. However, records do not substantiate this claim but show that white employees have been upgraded without testing.
- 8) Records show that despite the fact that nine Negro employees had better educational backgrounds, a white employee with a sixth grade education (James L. Williams in the Coal Handling Department) was permitted to progress to the higher rated job of coal handler operator at approximately \$2.35 per hour while the Negroes were not given such opportunity.

Case Nos. 6-3-1852 thru -1861  
-1863 thru -1866

- 9) A tour of the facilities disclosed that respondent, at the time of the investigation maintained segregated facilities (locker rooms, showers and drinking fountains) for its Negro employees.
- 10) Records indicated that white employees were permitted to work overtime while Negroes were not.

FINDING

The Commission finds reasonable cause to credit the allegations of charging parties.

For the Commission:

Sept 8, 1966  
Date

Marie D. Wilson  
Marie D. Wilson, Secretary

## Plaintiff's Exhibit 10



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20506

September 9, 1966

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

In Reply Refer to  
File No. 6-3-1858

Respondent:

Duke Power Company  
Draper, North Carolina

Mr. Willie R. Boyd  
505 Tipton Street  
Reidsville, North Carolina 27320

Dear Mr. ~~Boyd~~ *Gregg*

Due to the heavy workload of the Commission, it has been impossible to undertake or to conclude conciliation efforts in the above matter as of this date. However, the conciliation activities of the Commission will be undertaken and continued.

Under the provisions of Section 706(e) of Title VII of the Civil Rights Act of 1964, the Commission must notify you of your right to bring an action in Federal District Court within a limited time after the filing of a complaint.

This is to advise you that you may within thirty days of the receipt of this letter, institute a civil action in the appropriate Federal District Court. If you are unable to retain an attorney the Federal Court is authorized in its discretion, to appoint an attorney to represent you and to authorize the commencement of the suit without payment of fees, costs or security. If you decide to institute suit and find you need such assistance, you may take this letter, along with the enclosed Commission determination of reasonable cause to believe Title VII has been violated, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and to request that a Federal District Judge appoint counsel to represent you.

Please feel free to contact the Commission if you have any questions about this matter.

cc: ~~Mr. Jack Greenberg~~  
~~Mr. Herbert Hill~~

Very truly yours,

Kenneth F. Holbert  
Acting Director of Compliance

Enclosure

## Plaintiff's Exhibit 11

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

WILLIE S. BRIGGS, et al.,  
Plaintiffs,  
v.  
DUKE POWER COMPANY, a  
corporation,  
Defendant.

CIVIL ACTION

NO. C-210-G-66

INTERROGATORIES

TO: GEORGE W. FERGUSON, JR., ESQ.  
WILLIAM I. WARD, JR., ESQ.  
CARL HORN, JR., ESQ.  
c/o Duke Power Company  
Legal Department  
P. O. Box 2178  
Charlotte, North Carolina 28201

Attorneys for Defendant

PLEASE TAKE NOTICE that plaintiffs request, pursuant to Rule 33 of the Federal Rules of Civil Procedure, that Defendant answer under oath, within fifteen (15) days after service hereof, the following written interrogatories which written interrogatories relate to defendant's business located in Draper, North Carolina, except those interrogatories which call for information not limited to defendant's business located in Draper, North Carolina:

1. State whether Duke Power Company (hereinafter referred to as the "Company") is an employer within the meaning of §701(b), Title VII of the Civil Rights Act of 1964, (42 U. S. C. §2000e(b)).

2. State the address and location of the office. ny's main

3. State the name and last known address of the Company whose headquarters are located in the office listed in response to Interrogatory No. 1 with respect to each such person their duties indicate

4. State the address and location of all branches, district offices and power plants or owned by the Company in the State of North Carolina, operated

5. Describe generally the operations of the offices, branches, district offices or power plants listed in response to Interrogatory No. 4 (excepting those located in Draper, North Carolina) any's facilities

6. Describe, with particularity, all facilities by the Company at its facility located in Draper, North Carolina (hereinafter referred to as the Dan River Steam Station).

7. State the name and last known address of the Dan River Steam Station and indicate the duties of each such officer. all officers of

8. State whether any work done or services rendered by the Company at any of its offices, branches, district offices or power plants in the State of North Carolina performed by the contract with any department of the United States or the answer is yes, state: pursuant to a

- (a) The nature of each such contract with the Government. If
- (b) The name of the contracting agency of the United States
- (c) List each plant or facility at which any such work is done or performed;
- (d) Whether the Company is required to maintain records of such contracts to indicate the race of employees for purposes of Federal compliance review. If so, designate each such record, and



- (e) Whether the Company has submitted any reports to any department of the United States Government which indicate the racial composition of its employees at the Dan River Steam Station at any time since July 2, 1964, and, if so, state the date on which such report was submitted, the nature of each such report and the agency to which each such report was submitted.

9. State the total number of persons employed by the Company at the Dan River Steam Station as of:

- (a) July 2, 1964,
- (b) July 2, 1965;
- (c) October 20, 1966;
- (d) December 31, 1966.

10. State the total number of white persons employed by the Company at the Dan River Steam Station as of:

- (a) July 2, 1964;
- (b) July 2, 1965;
- (c) October 20, 1966;
- (d) December 31, 1966.

11. State whether employees of the Dan River Steam Station are classified according to jobs performed. If the answer is yes, list all departments and job classifications within each department and if no department, list the job classifications and/or job categories used by the Company in making work assignments for its employees at the Dan River Steam Station, including clerical, maintenance and supervisory employees.

12. With respect to each job classification or job category listed in response to Interrogatory No. 11:

- (a) Give a job description or summary of duties required of each (if reduced to writing, identify each and every record in which such may be found);
- (b) List the starting wages for each job classification or job category (if reduced to writing, identify each and every record in which such may be found);



- (c) State the requirements or qualifications needed by an employee to perform each such job (if reduced to writing, identify each and every record in which such may be found);
- (d) Give the number of white employees in each job classification or job category as of:
  1. July 2, 1964;
  2. July 2, 1965;
  3. October 20, 1966;
  4. December 31, 1966.

(e) Give the number of Negro employees in each job classification or job category as of:

1. July 2, 1964;
2. July 2, 1965;
3. October 20, 1966,
4. December 31, 1966.

13. List the address and location of the employment office which employs persons for any position at the Company's Dan River Steam Station.

14. With respect to each person interviewed for employment at the Company's Dan River Steam Station at any time since July 2, 1965:

- (a) State each such person's name and race and the date the application was made and for what position made, if any;
- (b) State the name and last known address of the person who, on behalf of the Company, interviewed such person;
- (c) Describe each and every written or oral test given each such person by or on behalf of the Company and set forth the results thereof;
- (d) Set forth all such person's qualifications, including but not limited to education, health and prior experience relative to employment by the Company which were made known to the Company;
- (e) Describe the disposition of each such application and set forth each and every reason therefor;

- (f) If the person was employed by the Company subsequent to July 2, 1965, describe such person's entire employment history with the Company, including the date of employment, each job classification or category in which such person has worked, initial starting salary and any change therein and the date of each such change.

15. With respect to each employee at the Company's San River Steam Station in the employment of the Company as of July 2, 1965 who was promoted, advanced or transferred to a different job classification at any time since July 2, 1965:

- (a) State such person's name and race;
- (b) State the date of initial job category and initial starting salary;
- (c) State the job classification or job category from which such person was promoted, advanced or transferred and the date on which such person was promoted, advanced or transferred at any time since July 2, 1965;
- (d) State the name of the person who, on behalf of the Company, recommended the promotion, advancement or transfer, and the name of the person who, on behalf of the Company, approved the promotion, advancement or transfer;
- (e) Describe each and every written and oral test, if any, given each such person by or on behalf of the Company, the date on which such test was given relative to promotion, advancement or transfer and set forth the results thereof.

16. With respect to each employee at the Company's San River Steam Station in the employment of the Company as of July 2, 1965 and who received a pay increase at any time since July 2, 1965:

- (a) State each such person's name and race;
- (b) State the date of initial employment, initial job category, initial starting wages;
- (c) State each pay increase subsequent to July 2, 1965, date or dates of each increase, job category in which such person was employed at the time of each pay increase.

17. State the name, race and last known address of each person with the Company as of July 2, 1965 or employed at any time since July 2, 1965 with duties connected with the attraction, screening or hiring job applicants for the Company at Dan River Steam Station. Describe all duties and responsibilities of each such person.

18. State the name, race and last known address of each person in the employment of the Company as of July 2, 1965 or employed at any time since July 2, 1965 with duties connected with their promotion or evaluation for promotion or who recommends wage increases of employees at the Dan River Steam Station. Describe all such duties and responsibilities of each such person.

19. Describe and designate:

- (a) Each job vacancy and the date the vacancy occurred which existed at the Company's Dan River Steam Station at any time between July 2, 1965 and December 31, 1966;
- (b) The name, race, date of initial employment, prior job classification, if any, of each employee who filled each such vacancy.

20. List the job categories or classifications in which the Company has never employed a Negro person at the Dan River Steam Station.

21. List the job categories or job classifications in which the Company has never employed a white person at the Dan River Steam Station.

22. If tests are administered as a condition of employment or promotion from any job category to another job category at the Dan River Steam Station, state:

- (a) Whether such tests are oral or written and, if written, attach a copy of each such test used;
- (b) The purpose for which such tests are administered;
- (c) The passing score or grade for each such test;
- (d) The date the Company initiated the use of such test;

- (e) Whether the test results were made available to employees or applicants;
- (f) How such tests are scored;
- (g) Whether the person who scores the test sees the applicant or in any way knows the race of the applicant before the tests are scored;
- (h) The name of the person who has the responsibility for the administration and scoring of such tests;
- (i) The source of such tests, i.e., whether prepared by the Company or purchased from a testing agency. If purchased from a testing agency, list the name and address of such agency;
- (j) The latest date on which such tests were validated for the purpose used by the Company;
- (k) The category of jobs referred to in Interrogatory No. 11 for which tests are administered.

23. State, in detail, the Company's practice with respect to filling job vacancies with employees in its employment at the San River Steam Station.

24. State the name and race of each employee who, since July 2, 1965, has been promoted, advanced or transferred to a different job category or job classification without having to take a test and with respect to each such employee state:

- (a) The job from which such person transferred, the date of the transfer and the job to which such person was transferred;
- (b) The date of initial employment of such person.

25. Describe with particularity suitable as a description in a subpoena all records maintained by the Company relating to employees or employment history of employees at the San River Steam Station and indicate those records containing information on the educational background of employees.

26. State whether any of the Company's records indicate the race of employees (whether by specific racial identification, inclusion of photographs or otherwise) and, if so, state:

- (a) The nature of each such record,
- (b) The nature of such racial identification, i.e., whether Negro or white, Indian or other (if other, describe);
- (c) The purpose for which such information is recorded;
- (d) The date on which the Company initiated the practice of maintaining records relating to the racial identification of employees;
- (e) If such information is no longer recorded, the date when such recordation was terminated.

27. State whether the Company provides on-the-job training for any of its employees at the Dan River Steam Station. If so:

- (a) List the jobs for which the Company provides on-the-job training;
- (b) List the objective criteria used by the Company in the selection of employees for on-the-job training.

28. List the names of all unions which represent employees of the Company and list the employees by job category who are represented by each such union.

29. State whether the Company has entered into a collective bargaining agreement with any union referred to in Interrogatory No. 28 at any time since July 2, 1965. If the answer is yes, state the name of each such union and the date on which each collective bargaining agreement was entered into.

30. State whether the Company maintains seniority lists for employees at the Dan River Steam Station. If so, attach a copy of the most recent seniority lists and the two next preceding seniority lists.

31. List the name of each Negro person employed by the Company at the Dan River Steam Station as of October 20, 1966. With respect to each such person, state:

- (a) Date of initial employment, initial job category, initial starting salary,

- (b) Present job category and present salary.  
(This interrogatory need not be answered if all the information called for by this interrogatory is included in the information contained in Interrogatory No. 30).

32. List the name of each white person employed by the Company at the Dan River Steam Station as of October 20, 1966. With respect to each such person, state:

- (a) Date of initial employment, initial job category, initial starting salary;
- (b) Present job category and present salary.  
(This interrogatory need not be answered if all the information called for by this interrogatory is included in the information contained in Interrogatory No. 30).

33. State whether the Company has ever had a job evaluation study made at its Dan River Steam Station. If so, state the date on which the last job evaluation study was made and identify each document or record containing such study.

34. State the name and race of each employee who has worked overtime on any job at any time since July 2, 1965 and with respect to each such employee, indicate:

- (a) Dates on which each such employee worked overtime.
- (b) Job performed while working overtime.

35. State whether the Company ever maintained the practice, custom or policy of maintaining any lavatories, toilets, locker rooms or drinking facilities to be used exclusively by Negro persons. If so, state the reason therefor.

36. If the Company maintained a custom, policy or practice of maintaining any lavatories, toilets, locker rooms or drinking facilities to be used exclusively by Negro employees and that custom, policy or practice has ceased, please state:

- (a) The date when such policy ceased;
- (b) What evidence since July 2, 1965 that the policy has ceased.

37. State the name of the official or employee of the Company who is responsible for assigning lockers to employees at the Dan River Steam Station.

38. With respect to the Second Defense alleged in the Company's answer filed in this suit, state, with particularity, all written interpretations of the Office of the General Counsel of the Equal Employment Opportunity Commission on which the Company allegedly relies concerning the employment and promotion practices at its Dan River Steam Station as such interpretations relate to the allegations of racial discrimination contained in plaintiffs' complaint.

39. State whether the Company was served with copies of the charges filed by the plaintiffs with the Equal Employment Opportunity Commission (EEOC file numbers 6-3-1852-1866). If so, state the name or names of persons who received such copies on behalf of the Company and the date on which such copies were received.

DATED: \_\_\_\_\_

CONRAD O. PEARSON  
203 1/2 East Chapel Hill Street  
Durham, North Carolina

SAVVIS CROGG, JR.  
622 East Washington Drive  
High Point, North Carolina

J. LYNNAL CHATTERS  
405 1/2 East Trade Street  
Charlotte, North Carolina

JACK GREENBERG  
LEROY CLARK  
ROBERT FALICK  
10 Columbus Circle  
New York, New York 10019

Attorneys for Plaintiffs

IN THE  
UNITED STATES DISTRICT COURT  
FOR THE  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

WILLIE S. GREGGS, et al.,

Plaintiffs,

v.

DUKE POWER COMPANY, a  
corporation,

Defendant.

CIVIL ACTION

NO. C-210-G-66

ANSWERS TO INTERROGATORIES

Defendant submits the following as answers to the interrogatories served on it by plaintiffs except in those instances where the defendant has objected to such interrogatory:

1. In the opinion of the attorneys for Duke Power Company, the Company is an employer within the meaning of 42 USCA Sec. 2000e(b).
2. 422 South Church Street, Charlotte, Mecklenburg County, North Carolina.

3.

Title - Area of Responsibility

President - Chief Executive Officer  
Exec. Vice President, Retail Operations  
Exec. Vice President, Power Operations  
Vice President, Finance & General Counsel  
Senior Vice President, Transmission &  
Electric Installations  
Vice President, Personnel - Safety  
Vice President, System Planning  
Vice President, Marketing  
Vice President, Rates

Name

W. B. McGuire  
D. W. Jones  
J. B. Parker  
Carl Horn, Jr.  
  
G. C. Mattison  
Kenneth Austin  
F. W. Beyer  
D. W. Booth  
G. A. Coan



<u>Title - Area of Responsibility</u>	<u>Name</u>
Vice President, Engineering - Design	W. S. Lee
Vice President, Public Relations	J. P. Lucas, Jr.
Vice President, Rate Consultant	C. S. Reed
Vice President, Production & Operation	A. C. Thies
Asst. Vice President, Real Estate	C. J. Blades
Asst. Vice President, Public Relations	W. J. Burton
Asst. Vice President, Distribution Engineering	P. D. Huff
Asst. Vice President, Operation	Lloyd P. Julian
Asst. Vice President, District Operations	J. W. Lewis
Asst. Vice President, Finance	Carl McCraw, Jr.
Asst. Vice President, Construction - Major Plant	C. E. Watkins
Treasurer & Comptroller	Vance Huggins
Asst. Treasurer - General Accounting Records	R. L. Asbury
Asst. Treasurer - Methods - Procedures - Financial Studies	R. E. Fraser
Asst. Treasurer - Data Processing Operations	J. W. Lawrence
Secretary - Corporate Duties	J. D. Hicks
Asst. Secretary - Statistical	J. C. Goodman, Jr.
Asst. Secretary - Assistant in Corporate Duties	Jas. S. Sease

The last known address of all of the above officers was P. O. Box 2178, Duke Power Company, Charlotte, North Carolina.

4. (See list attached.)

5. Steam Stations - The operation and maintenance of equipment to generate electric energy. The general process is by coal fired boilers and steam turbine-generators.

Hydro Station - The operation and maintenance of equipment to generate electric energy. The general process is by water driven turbine-generators.

A district office of the Duke Power system has the duty to develop a market for electricity and to supply, operate and maintain the electric distribution system of Duke Power Company to satisfy electrical energy requirements of the customers within a defined area. It is also responsible for local transit operations in four cities and water supply in two cities.

A branch office carries on some of the same functions as a district office, but under the district office and in a smaller area.

6. The over-all operation conducted by the Company at its Dan River Steam Station is the conversion of energy from coal into electricity. The following are descriptions of the parts of the one operation:

Coal Handling: Coal is brought in by rail, unloaded, and moved by conveyor belts to storage location or to the plant bunkers. Some of it is crushed by machinery. The coal moves by conveyors from the storage location into the generating plant as needed. Employees in coal handling perform duties in this phase of the operation.

Power Generation: In the generating plant the coal is pulverized to talcum powder fineness. The powdered coal is blown into boilers, is turned into steam by the heat from the burning of powdered coal. The steam, at temperatures up to 1,000 degrees and under pressures up to 1,850 pounds per square inch, is piped to the turbines.

The heat energy in the steam is released when it expands through a series of blades in the turbines causing the turbine shaft to turn. The turbine shaft is connected with the shaft in the generator which converts the mechanical energy of rotation into electric energy.

Some of the steam, after passing about halfway through the turbines, is piped back to the boilers and reheated, then sent back through the turbines.

After going through the turbines, the steam flows over tubes in the condensers. River water is pumped through tubing to condense the steam into water. After being condensed, the water is pumped back into the boilers so that the purified water is used over and over again.

After electricity is generated, its voltage is stepped up in transformers and is sent on conductors through substations into the Company transmission system. Employees in Power Station Operation handle these phases of the operation.

Testing and Laboratory: Employees in this phase of the operation determine that the water for the boilers is purified, that it and the coal used meet certain standards, and they perform other necessary performance testing and chemical testing functions connected with the whole operation. Instruments and controls are maintained by this group.

General Maintenance (Technical): Employees in this phase of operation are responsible for structural maintenance of power station as well as electrical and mechanical repairs to equipment within the station or grounds associated with the station.

Laborer: Employees in this phase of the operation are responsible for nonstructural maintenance of the power station and general upkeep of the buildings and grounds.

Miscellaneous: Employees in other phases of the over-all operation are engaged in watchman and plant security duties, clerical work, and storekeeping.

7. No officers of the Company are assigned to Dan River Steam Station.

Mr. J. D. Knight is Superintendent and in charge of all operations at the Station. His address is P. O. Box 447, Draper, North Carolina. His assistant is J. Dan Rhyme, whose address is P. O. Box 447, Draper, North Carolina.

## 8. (Objected to by defendant.)

9.	July 2, 1964	15
	July 2, 1965	14
	October 20, 1966	14
	December 31, 1966	14
10.	July 2, 1964	85
	July 2, 1965	83
	October 20, 1966	81
	December 31, 1966	81

## 11. Yes.

POWER STATION OPERATORS

Control Operator  
 Pump Operator  
 Utility Operator  
 Learner

LABOR

Labor Foreman  
 Auxiliary Serviceman  
 Laborer (Semi-Skilled)  
 Laborer (Common)

COAL AND MATERIAL HANDLING

Coal Handling Foreman  
 Coal Equipment Operator  
 Coal Handling Operator  
 Helper  
 Learner

MISCELLANEOUS

Watchman  
 Clerk  
 Chief Clerk  
 Storekeeper

MAINTENANCE

Machinist  
 Electrician-Welder  
 Mechanic A  
 Mechanic B  
 Repairman  
 Learner

SUPERVISORS

Superintendent  
 Assistant Superintendent  
 Plant Engineer  
 Assistant Plant Engineer  
 Chemist  
 Test Supervisor  
 Maintenance Supervisor  
 Assistant Maintenance Supervisor  
 Shift Supervisor  
 Junior Engineer

TEST AND LABORATORY

Testman - Labman  
 Lab and Test Technician  
 Lab and Test Assistant

12. (a) Job descriptions or summaries of duties required of each were not previously reduced to writing and are not in Company records, but such descriptions are reduced to writing solely for the purpose of answering this interrogatory. See attachments.

(b) See attachment. These are found in the Steam Production Department, Duke Power Company, Charlotte, North Carolina, and filed in its records under the heading "Wage Brackets." Copies are filed in the records of the Payroll Department and in the records of the Personnel Department, both in the General Offices, Duke Power Company, Charlotte, North Carolina. A copy is also in the files of the Superintendent, Dan River Steam Station, Draper, North Carolina.

(c) See attachment. Requirements or qualifications have not previously been reduced to writing and are not to be found in any record.

(d) See attachment.

(e) LABORERS (SEMI-SKILLED)

July 2, 1964	12
July 2, 1965	11
October 20, 1966	11
December 31, 1966	13

LABORERS (COMMON)

July 2, 1964	3
July 2, 1965	3
October 20, 1966	2
December 31, 1966	0

COAL HANDLING LEARNER

July 2, 1964	0
July 2, 1965	0
October 20, 1966	1
December 31, 1966	1

13. (Objected to by defendant.)

14. (Objected to by defendant.)

15. See attachment.

16. See attachment. (Defendant withdraws its objection to sub-interrogatory

(b) by furnishing the initial starting wages.)

17. (Objected to by defendant.)

18. See attachment.

19. See attachment.

20. (Objected to by defendant.)

21. (Objected to by defendant.)

22. In the Company's Steam Production Department, an employee must have a high school education or a Certificate of Completion of General Education Development (GED) Tests, High School Level, to be eligible for consideration for promotion from watchmen and coal handling operator classifications to other departments within the station and from the laborer classification to other departments within the station. This requirement has been in existence for at least the past ten years. In

order to give its employees in coal handling, watchmen, and laborer classifications without high school educations an opportunity to be considered for promotion to the higher paying job classifications, the Company provided that in lieu of the high school education any person on its payroll prior to September 1, 1965, who could pass the regular employment tests would be considered as having met the high school education requirement. This testing policy was designed to include rather than exclude those employees without high school educations who were employed prior to September, 1965, for consideration for promotion. In addition, employees without a high school education who did not desire to qualify for consideration for promotion through the testing procedure were advised they could take advantage of the Company's tuition refund program in order to obtain a high school education. Thus, employees in the coal handling, laborer, or watchman classifications have three (3) standardized nondiscriminatory alternatives by which they can qualify for consideration for promotion. Neither alternative automatically qualifies an employee for promotion. In view of the foregoing explanation, Defendant is of the opinion that the tests are not per se a condition for promotion.

Without admitting that the tests are a condition for promotion, Defendant nevertheless provides the following information pertaining to testing:

(a) They are written; copies attached.

(b) See explanation, above.

(c) Wonderlic	20
Mechanical Comprehension AA	39

(d) August 1, 1965

(e) Employees are advised whether or not they received the minimum acceptable score.

(f) Trained employees utilize scoring procedures furnished by suppliers of tests.

(g) Yes

(h) J. D. Knight

(l) The Psychological Corporation, 304 E. 45th Street, New York, New York 10017; Mechanical Comprehension AA; and E. F. Wonderlic, P. O. Box 7, Northfield, Illinois; Wonderlic Forms I and II.

(j) Minimum scores required in each of the tests used were established by an evaluation of the norms supplied by the publishers of the tests generally following the 50th percentile. In addition, the average level on national norms was used in fixing minimum scores. This is in line with other industries comparable to ours.

(k) See explanation above.

(The Defendant objects to this interrogatory as it relates to whether or not tests are administered as a condition of employment.)

23. In filling job vacancies with employees in its employment at Dan River Steam Station, the following factors are taken into consideration:

- (1) The employee must have performed all the duties and operations satisfactorily in his present classification.
- (2) Seniority and merit.
- (3) Cooperation and ability to get along with others.
- (4) Has shown initiative, job interest and a willingness to work and learn.
- (5) Good physical condition.
- (6) Review of his records - promotions, sickness, tardiness, attitudes, etc.
- (7) See answer to Interrogatory No. 22.

24. See attachment for the information requested concerning Dan River Steam Station. (The Defendant has objected to this interrogatory as it relates to the entire Duke system.)

25. & 26. Form 114 'Employee's Service Record Card' has been maintained for each employee since December 31, 1956. Personnel file jackets at Dan River also contain information concerning education background of each employee. This information is not documented by transcripts. Since August 1, 1965, the personnel file on each job applicant employed contains Forms 0800+-1 and 0800+-2 'Application for Employment' which indicate educational background.

The race of the employee is shown on Form 114 but is not shown on 0800+-1 and 0800+-2. These records are kept in a confidential status.

(a) Form 114 is a historical record which reflects changes in rates of pay as well as classification changes. It also reflects date of birth and sex of employee.

(b) The racial identification is either 'White' (W) and 'Colored' (C) or 'Negro'.

(c) The information on Form 114 is kept (1) so that the superintendent who is responsible for reviewing the employee might have up-to-date wage information and (2) so that race information required by the Federal Government can be provided.

(d) Records relating to racial identification have been maintained since December 31, 1936.

(3) Racial information is still recorded (See (c)(2) above).

(The Defendant has objected to Interrogatory 26 as it applies to the entire Duke system.)

27. Yes. The Company provides on-the-job training for its employees at Dan River Steam Station.

(a) On-the-job training is provided for all job classifications.

(b) Training is given as required by employees to become proficient in their jobs and to prepare for the next higher jobs in their respective departments.

28. At Dan River Steam Station, the International Brotherhood of Electrical Workers (IBEW) is the only union representing employees of the Company. The employees by job category who are represented by such union at Dan River are set forth by job category on the seniority list for 1967 attached as requested by Interrogatory 30.

(The Defendant has objected to this interrogatory as it relates to employees and offices, etc. at places other than Dan River Steam Station.)

29. On or about January 31, 1967, the Company agreed on terms of a collective bargaining contract covering employees represented by the IBEW, including employees at Dan River. To date the contract has not been ratified by the locals. Upon ratification it will be effective from January 1, 1967 thru December 31, 1967.

(The Defendant has objected to the interrogatory to the extent that it calls for information regarding collective bargaining agreements which do not affect employees at Dan River Steam Station.)

30. See attachment.

31. See attachment.

32. See attachment.

33. No formal job evaluation study has been made at Dan River Steam Station.



24. See attached twenty-six pages for information concerning employees at Dan River Steam Station.

(The Defendant has objected to the interrogatory as it pertains to overtime records for all of the employees of Duke Power Company.)

35. When Dan River Steam Station was put into service some 17 years ago, the Company provided separate lavatories, toilets, locker rooms, and drinking facilities for Negro persons and white persons. Such separate facilities for Negroes were customarily used by them and such separate facilities for white persons were customarily used by them. Negro persons were assigned lockers in a separate area. The locker rooms and drinking facilities were marked "Colored" and "White." Sometime in 1963, the marking were removed from the drinking facilities and locker rooms. Although there were no restrictions regarding race in the use of lockers, toilets, or lavatories after sometime in 1963, white persons and Negro persons continued to use separate facilities. All drinking fountains, toilet facilities, and locker rooms are now used jointly by employees of both races.

If the foregoing is considered as "maintaining the practice, custom or policy of maintaining" facilities "to be used exclusively by Negro employees", the reason for it was because at the time it was in keeping with the customs of the people in the region in which Dan River Steam Station was located.

36. If the answer to Interrogatory 35 is considered to have been answered in the affirmative, the answers requested to this interrogatory are:

(a) In 1963. In late April or early May, 1966, Negro employees and white employees were actually assigned lockers so that some of each race would have lockers in the same room. The toilet and lavatory facilities are immediately adjacent to the locker rooms and they are now customarily used by employees of both races. Drinking fountains are used by employees without regard to race.

(b) Visual.



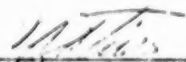
37. Employees choose any vacant locker they desire in any locker location, and once a choice is made, assignment to that locker is made by J. D. Knight, Superintendent, as a matter of course.

38. (a) Differential in pay not based on one of the Act's prohibited grounds, i.e., sex or race, etc. is not an unlawful employment practice. Opinion Letter, 10/2/65; GC 281-65.

(b) Discrimination based on educational qualifications does not violate Title VII. Opinion Letter, 10/2/65; GC 296-65.

(c) Section 703(h) provides that it is not an unlawful employment practice for an employer to give and to act upon the results of any professionally-developed ability or psychological test, provided that such test, its administration and action based upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. Opin. Ltrs. 12/16/65, GC Opin. 461-65.

39. Yes. J. D. Knight. April 26, 1966.

  
 A. C. Thies  
 Vice President, Production and Operation

NO. C-210-G-86

13. The employment office which employs persons for any position at the Company's  
Dan River Steam Station is the superintendent's office at the Dan River Steam Station,  
P. O. Box 447, Draper, North Carolina.

14. See attachment.

17. Mr. J. D. Knight, P. O. Box 447, Draper, North Carolina. Mr. J. Dan Rhyme, P. O. Box 447, Draper, North Carolina. Both Mr. Knight and Mr. Rhyme are white and their respective duties and responsibilities are shown in the answer to Interrogatory No. 18.

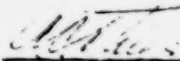
20. See attachment.

21. During the construction of the Dan River Steam Station, several persons of the white race were employed as laborers. Since the Dan River Steam Station has been operating, the only categories in which the Company has never employed white persons at the Dan River Steam Station are those of laborer, assistant control operator, coal equipment operator, and auxiliary serviceman.

At the conference between attorneys held pursuant to Local Rule 21(k), defendant's attorneys advised attorneys for plaintiffs that the answer to Interrogatory No. 35 filed on or about February 28, 1967, should be amended in certain respects and made more complete. Accordingly, the answer to Interrogatory No. 35, filed on or about February 28, 1967, is hereby deleted in its entirety and there is substituted therefor the following:

35. When Dan River Steam Station was put into service some 17 years ago, the Company provided separate lavatories, toilets, locker rooms, and drinking facilities for Negro persons and white persons. Such separate facilities for Negroes were customarily used by them. There are eight drinking fountains and two locker rooms which include adjacent toilet facilities. There have never been any signs indicating that either drinking facilities or locker rooms were for the exclusive use of either Negroes or whites; however, Negro persons were assigned lockers in a separate area. Although there were no restrictions regarding race in the use of lockers, toilets, or lavatories after sometime in 1963, white persons and Negro persons continued to use separate facilities. All drinking fountains, toilet facilities, and locker rooms are now used jointly by employees of both races.

If the foregoing is considered as "maintaining the practice, custom or policy of maintaining" facilities "to be used exclusively by Negro employees", the reason for it was because at the time it was in keeping with the customs of the people in the region in which Dan River Steam Station was located.



---


A. C. Thies

Vice President, Production and Operation

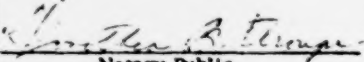
STATE OF NORTH CAROLINA )  
 )  
 COUNTY OF MECKLENBURG )

A. C. Thies, being duly sworn, deposes and says:

That he is Vice President, Production and Operation, of Duke Power Company; that he has read and knows the contents of the foregoing Answers to Interrogatories; that the same are true of his own knowledge, except as to the matters therein stated on information and belief, and as to these, he believes them to be true.

  
 A. C. Thies  
 Vice President, Production and Operation

SWORN to and subscribed before  
 me this 28th day of February, 1967.

  
 Notary Public

My Commission Expires: Nov 20, 1967

(Notarial Seal)

NORTH CAROLINA     )  
                               )  
 MECKLENBURG COUNTY )

WILLIE S. GRIGGS, et al., )  
                               )  
                               Plaintiffs, )  
                               )  
                               v.                     )  
                               )  
 DUKE POWER COMPANY, a )  
 corporation,                )  
                               )  
                               Defendant.        )

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Answers to Interrogatories on the plaintiffs in the above-entitled action by mailing a copy thereof properly addressed, postage prepaid to the attorneys for plaintiffs as follows:

Mr. Conrad O. Pearson  
 203 1/2 East Chapel Hill Street  
 Durham, North Carolina

Mr. Sammie Chess, Jr.  
 622 East Washington Drive  
 High Point, North Carolina

Mr. J. LeVonne Chambers  
 405 1/2 East Trade Street  
 Charlotte, North Carolina

Mr. Jack Greenberg  
 Mr. Leroy Clark  
 Mr. Robert Belton  
 10 Columbus Circle  
 New York, New York 10019

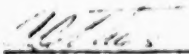
This 17th day of March, 1967.

George W. Ferguson, Jr.  
 Assistant General Counsel

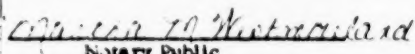
STATE OF NORTH CAROLINA )  
 )  
 COUNTY OF MECKLENBURG )

A. C. Thies, being duly sworn, deposes and says:

That he is Vice President, Production and Operation, of Duke Power Company;  
 that he has read and knows the contents of the foregoing Answers to Interrogatories;  
 that the same are true of his own knowledge, except as to the matters therein stated on  
 information and belief, and as to these, he believes them to be true.

  
 A. C. Thies  
 Vice President, Production and Operation

SWORN to and subscribed before  
 me this 17th day of March, 1967.

  
 Notary Public

My Commission Expires: 12-8-67

(Notarial Seal)

NORTH CAROLINA       )  
                                  )  
MECKLENBURG COUNTY )

WILLIE S. GRIGGS, et al.,    )  
                                  )  
                          Plaintiffs,    )  
                                  )  
                          v.                )  
                                  )  
DUKE POWER COMPANY, a       )  
corporation,                    )  
                                  )  
Defendant.                    )

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Answers to Interrogatories on the Plaintiffs in the above-entitled action by mailing a copy thereof properly addressed, postage prepaid to the attorneys for Plaintiffs as follows:

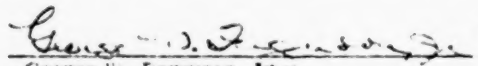
Mr. Conrad O. Pearson  
203 1/2 East Chapel Hill Street  
Durham, North Carolina

Mr. Sammie Chess, Jr.  
622 East Washington Drive  
High Point, North Carolina

Mr. J. Levonne Chambers  
405 1/2 East Trade Street  
Charlotte, North Carolina

Mr. Jack Greenberg  
Mr. Leroy Clark  
Mr. Robert Belton  
10 Columbus Circle  
New York, New York 10019

This 28th day of February, 1967.

  
George W. Ferguson, Jr.  
Assistant General Counsel



8. (1)

Standard Form 300  
MAY 1968

- Equal Employment Opportunity Commission ☒
- Office of Federal Contract Compliance ☐
- Plans for Progress Program ☐

(Check all agencies whose programs apply to your company)

# EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1

IMPORTANT: Read the attached instructions carefully before preparing this report. Before March 31 of the reporting year, submit all reports in quadruplicate (via company headquarters) to: Joint Reporting Committee, 1800 G St. NW, Washington, D.C. 20526. (If this form is used as a consolidated report for all reporting units of a multi-establishment employer, please indicate in Item 3A. Multiestablishment employers need not fill in Items 3D, 4A, 4B, 7A, 7B, and 10 on their consolidated reports. Such items should be answered on the individual reporting unit's report.)

3A. Name and Address of Principal Office of the Company

Duke Power Co.  
422 S. Church St., Charlotte, N. C.

3A. Name and Address of Parent Company if an Affiliated Corporation

N.A.

1B. Employer Identification No.

56-020-5520

1C. Reporting Unit No.

28

CODES  
(Leave blank)

2B. Employer Identification No. for Parent Company

N.A.

3A. Reporting Unit: Name and Identification and Location (City, Street Address, County, State) of Unit for which This Report is Prepared

Dan River Steam Station  
P.O. Box 447, Draper, N. C. (Rockingham)

3B. Reporting Unit No.

22

4A. Major Activity Performed at This Reporting Unit. (Designate only one.)

Generation of Electricity

4B. Last Report Submitted for This Reporting Unit:

Initial Report

Date Unit No.

5. Employment at This Reporting Unit (Leave no blank spaces. If no employees in category, write "0".)

OCCUPATIONS	MALE EMPLOYEES					FEMALE EMPLOYEES					TOTAL ALL EMPLOYEES
	Total Males	Minority Groups				Total Females	Minority Groups				
		NEGRO	ORIENTAL <sup>1</sup>	AMERICAN INDIAN <sup>1</sup>	SPANISH AMERICAN <sup>1</sup>		NEGRO	ORIENTAL <sup>1</sup>	AMERICAN INDIAN <sup>1</sup>	SPANISH AMERICAN <sup>1</sup>	
OFFICIALS AND MANAGERS	5	0	0	0	0	0	0	0	0	0	5
PROFESSIONALS	7	0	0	0	0	0	0	0	0	0	7
TECHNICIANS	5	0	0	0	0	1	0	0	0	0	6
SALES WORKERS	0	0	0	0	0	0	0	0	0	0	0
OFFICE AND CLERICAL	3	0	0	0	0	0	0	0	0	0	3
RAFTSMEN (Skilled)	38	0	0	0	0	0	0	0	0	0	38
OPERATIVES (Semiskilled)	32	11	0	0	0	0	0	0	0	0	32
LABORERS (Unskilled)	3	3	0	0	0	0	0	0	0	0	3
SERVICE WORKERS	4	0	0	0	0	0	0	0	0	0	4
TOTAL	97	14	0	0	0	1	0	0	0	0	98
TOTAL EMPLOYMENT FROM PREVIOUS REPORT (if any)	NA										

6. (Figures for the following classifications shall also be included in the appropriate category above the "Total" line.)

APPRENTICES	NA										
ON-THE-JOB TRAINEES											
WHITE COLLAR	NA										
PRODUCTION	NA										

See Section 4g of the Instructions.

Report only employees enrolled in formal on-the-job training programs.

A. How was the information in Items 5 and 6 obtained? (Check one)

☐ Visual survey; ☐ Employment record; ☒ Other (Specify)

# Data Processing Records

February 1966

ESTABLISHMENT EMPLOYERS MAY SUBMIT THE INFORMATION CALLED FOR IN ITEMS 8 AND 9 FOR ALL ESTABLISHMENTS WITH THEIR CONSOLIDATED REPORTS, OR WITH EACH INDIVIDUAL REPORT

	YES	NO
Does the employer participate in or contribute to an apprenticeship program or programs? If yes, please submit on an attached sheet the following information for each such program in which you have participated or to which you have contributed for a period of 18 months preceding the preparation of this report BUT ONLY if the program is NOT registered with the Bureau of Apprenticeship and Training of the U.S. Department of Labor: (a) Name and location of joint apprenticeship committee, if any; (b) Trade or craft; (c) Name and location of participating trade association, if any; (d) Local number, international name, and location of participating labor organization, if any.		X
Does the employer have any arrangement with a labor organization, pursuant to a collective bargaining agreement or other contract or understanding, formal or informal, by which the employer is obligated or required to accept for employment, or customarily and regularly accepts for employment, persons referred by such labor organization or any officer, agent, or employee thereof? If yes, and if the arrangement has been in effect for a period of 18 months preceding the preparation of this report, list on an attached sheet the local number, international name, and location of each such labor organization.		X
Are there any employee facilities (i.e., drinking fountains, rest rooms, recreational areas, lunchrooms, etc.) at this reporting unit which are provided for employees on a racially separate basis?		X

Remarks. (Use this item to give any identification data appearing on last report which differs from that given above and explain major changes in employment, changes in composition of reporting units, and other pertinent information.)

None

FOLLOWING QUESTIONS ARE TO BE ANSWERED ONLY BY THOSE EMPLOYERS WHO ARE GOVERNMENT CONTRACTORS OR FEDERALLY-ASSISTED CONTRACTORS REQUIRED TO REPORT UNDER EXECUTIVE ORDER 11246

<p>(Check one box only.)</p> <p><input checked="" type="checkbox"/> Prime Contractor</p> <p><input type="checkbox"/> First-Tier Subcontractor</p>	<p>12C. Predominant Interest Agency for Company as a Whole. (Subcontractors shall give both their Predominant Interest Prime Contractor and that company's Predominant Interest Agency—See Instructions 3g and 3h.)</p> <p><b>Southeastern Power Administration</b></p>
<p>Is the equal employment opportunity clause included in all your subcontracts subject to Executive Order 11246 and have you informed your subcontractors of their responsibilities under Executive Order 11246? <del>XXXXXXXX</del></p> <p><b>N.A.</b></p>	<p>12D. Predominant Interest Agency for Last Report, if any</p> <p><b>Initial Report</b></p>

<p>Date</p> <p><b>April 28, 1966</b></p>	<p>11B. Type or Print Name, Title, and Address of Authorized Representative</p> <p><b>Kenneth Austin</b>  <b>Asst. Vice President, Personnel</b>  <b>422 S. Church St.</b>  <b>Charlotte, N. C.</b></p>	<p>11C. Signature of Authorized Representative</p> <p><i>Kenneth Austin</i></p>
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Standard Form 100  
JANUARY 1966

- Equal Employment Opportunity Commission ☒
- Office of Federal Contract Compliance ☐
- Plans for Progress Program ☐

(Check all agencies whose programs apply to your company)

# EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1

**INSTRUCTIONS.** Read the attached instructions carefully before preparing this report. Before March 31 of the reporting year, submit all reports in quarterly, if applicable, by company headquarters to Joint Reporting Commission, 1800 G St. NW, Washington, D.C. 20505. If this form is used as a consolidated report for all reporting units of a multi-establishment employer, please indicate in Item 3A. Multi-establishment employers need not fill in Items 3B, 4A, 4B, 4C, 4D, 4E, and 4F on their consolidated reports. Such items should be answered on the individual reporting unit's report.

<b>1A. Name and Address of Principal Office of the Company</b> Duke Power Co. 422 S. Church St., Charlotte, N.C.		<b>1B. Employer Identification No.</b> 56-020-5520	<b>1C. Reporting Unit No.</b> 28	<b>CODES</b> (Leave blank)
<b>2A. Name and Address of Parent Company if an Affiliated Corporation</b> N.A.		<b>2B. Employer Identification No. for Parent Company</b> N.A.		
<b>3A. Reporting Unit: Name or Identification and Location (City, Street Address, County, State) of Unit for which This Report is Prepared</b> Consolidated Report			<b>3B. Reporting Unit No.</b>	
<b>4A. Major Activity Performed at This Reporting Unit. (Designate only one.)</b> Electric Utility			<b>4B. Last Report Submitted for This Reporting Unit:</b> Initial Report Date ..... Unit No. ....	

**5. Employment at This Reporting Unit (Leave no blank spaces. If no employees in category, write "0."):**

OCCUPATIONS	MALE EMPLOYEES					FEMALE EMPLOYEES					TOTAL ALL EMPLOYEES
	Total Males	Minority Groups				Total Females	Minority Groups				
		NEGRO	ORIENTAL <sup>1</sup>	AMERICAN INDIAN <sup>1</sup>	SPANISH AMERICAN <sup>1</sup>		NEGRO	ORIENTAL <sup>1</sup>	AMERICAN INDIAN <sup>1</sup>	SPANISH AMERICAN <sup>1</sup>	
OFFICIALS AND MANAGERS	672	0	0	0	0	2	0	0	0	0	674
PROFESSIONALS	273	0	0	0	0	24	1	0	0	0	297
TECHNICIANS	346	0	0	0	0	5	0	0	0	0	351
SALES WORKERS	83	2	0	0	0	17	0	0	0	0	100
OFFICE AND CLERICAL	693	26	0	0	0	747	1	0	0	0	1440
CRAFTSMEN (Skilled)	2084	10	0	0	0	0	0	0	0	0	2084
OPERATIVES (Semiskilled)	1058	212	0	0	0	1	1	0	0	0	1059
LABORERS (Unskilled)	337	282	0	0	0	4	4	0	0	0	341
SERVICE WORKERS	88	68	0	0	0	14	14	0	0	0	102
TOTAL	5634	600	0	0	0	814	21	0	0	0	6448
TOTAL EMPLOYMENT FROM PREVIOUS REPORT (if any)	NA										

<sup>1</sup> Figures for the following classifications shall also be included in the appropriate category above the "Total" line.)

APPRENTICES		NA									
ON-THE-JOB TRAINEES <sup>2</sup>	WHITE COLLAR	NA									
	PRODUCTION	NA									

<sup>2</sup> See Section 4g of the Instructions.

<sup>3</sup> Report only employees enrolled in formal on-the-job training programs.

7A. How was the information in items 5 and 6 obtained? (Check one.)

☐ Visual survey; ☐ Employment record; ☒ Other (Specify)

Data Processing Records

7B. Dates of Payroll Period Used. (You should gather and report employment data at the reporting unit during only one payroll period in December, January, or February. Multiestablishment employers need not use the same payroll period for all units but the month chosen at each unit must be used for subsequent annual reports.)

February 1966

MULTIESTABLISHMENT EMPLOYERS MAY SUBMIT THE INFORMATION CALLED FOR IN ITEMS 8 AND 9 FOR ALL ESTABLISHMENTS WITH THEIR CONSOLIDATED REPORTS, OR WITH EACH INDIVIDUAL REPORT

	YES	NO
8. Does the employer participate in or contribute to an apprenticeship program or programs? If yes, please submit on an attached sheet the following information for each such program in which you have participated or to which you have contributed for a period of 18 months preceding the preparation of this report BUT ONLY IF the program is NOT registered with the Bureau of Apprenticeship and Training of the U.S. Department of Labor: (a) Name and location of joint apprenticeship committee, if any; (b) Trade or craft; (c) Name and location of participating trade association, if any; (d) Local number, international name, and location of participating labor organization, if any.		X
9. Does the employer have any arrangement with a labor organization, pursuant to a collective bargaining agreement or other contract or understanding, formal or informal, by which the employer is obligated or required to accept for employment, or customarily and regularly accepts for employment, persons referred by such labor organization or any officer, agent, or employee thereof? If yes, and if the arrangement has been in effect for a period of 18 months preceding the preparation of this report, list on an attached sheet the local number, international name, and location of each such labor organization.		X
10. Are there any employee facilities (i.e., drinking fountains, rest rooms, recreational areas, lunchrooms, etc.) at this reporting unit which are provided for employees on a racially separate basis?		X
11. Remarks. (Use this item to give any identification data appearing on last report which differs from that given above and explain major changes in employment, changes in composition of reporting units, and other pertinent information.)		

None

THE FOLLOWING QUESTIONS ARE TO BE ANSWERED ONLY BY THOSE EMPLOYERS WHO ARE GOVERNMENT CONTRACTORS OR FEDERALLY-ASSISTED CONTRACTORS REQUIRED TO REPORT UNDER EXECUTIVE ORDER 11246

12A. (Check one box only.) <input checked="" type="checkbox"/> Prime Contractor <input type="checkbox"/> First-tier Subcontractor	12C. Predominant Interest Agency for Company as a Whole. (Subcontractors shall give both their Predominant Interest Prime Contractor and that company's Predominant Interest Agency—See Instructions 3g and 3h.)  Southeastern Power Administration
12B. Is the equal employment opportunity clause included in all your subcontracts subject to Executive Order 11246 and have you informed your subcontractors of their responsibilities under Executive Order 11246? <del>XXXXXX</del>	12D. Predominant Interest Agency for Last Report, if any  Initial Report
N.A.	

13A. Date  April 28, 1966	13B. Type or Print Name, Title, and Address of Authorized Representative  Kenneth Austin Asst. Vice President, Personnel 422 S. Church St. Charlotte, N. C.	13C. Signature of Authorized Representative  <i>Kenneth Austin</i>
---------------------------------	--	--

CONTROL OPERATORQualifications

Previous satisfactory performance as Pump Operator. Must be physically coordinated and must be physically able to stand for long periods.

Duties

The Control Operator under Shift Supervision is responsible for the safe, efficient operation of the station and its individual Units. To meet this responsibility he must:

1. Maintain communication with System Dispatcher.
2. Operate Substation as directed by System Dispatcher.
3. Make rapid decision and take necessary action to protect station equipment and/or personnel.
4. Operate Unit control to meet station load requirement efficiently at all times.
5. Maintain an accurate log of operational events. Log also to include station and unit generation records, transformer and generator operation, substation and line load records.
6. Assist the Shift Supervision in the training of new, lower classification operating personnel.
7. Maintain proficiency in performance of duties of lower operating classifications.
8. Relieve in lower operating classifications.

In addition to these specific responsibilities it is expected that the Control Operator will provide prompt, courteous communication over the Bell Telephone when on duty with the plant office closed.



## PUMP OPERATOR

### Qualifications

Previous satisfactory performance as Utility Operator. Must be physically coordinated and capable of exerting physical strength required for manual operation of equipment.

### Duties

The Pump Operator provides the patrol of the basement area of the station. He is responsible for the operation of unit component equipment which is located in the basement and is equipped with local control only. His duties are:

1. Provide visual and listening patrol of basement areas.
2. Provide Fire-Watch service in basement area and assist in fire-fighting where required.
3. Maintain essential station services such as:
  - a.) Service Water - Including Fire Protection.
  - b.) Filtered Water.
  - c.) Drinking Water.
  - d.) Plant Air.
  - e.) Instrument Air.
  - f.) Make-up.
  - g.) Closed Cooling Water.
4. Visually inspect on periodic patrol all equipment operated under Item 3 above. Service as required. Clean equipment as required.
5. Prepare for service unit component equipment located in basement by visually inspecting Hotwell, condensate pumps, condensate coolers, surge tanks, surge tank pumps, auxiliary condensate pumps, heater drain pumps, boiler feed pumps, vacuum pump, condenser water boxes, inlet piping and valves, generator gas and seal oil systems, related valves, piping, etc. to determine that equipment is ready for operation. Service equipment as required.

PUMP OPERATOR CONTINUEDDuties

6. Participate in start-up of unit by:
  - a.) Placing condensate system in operation.
  - b.) Operate Heat Exchanger as required.
  - c.) Performing local manual operations required for placing mills in service.
  - d.) Starting boiler feed pumps as required.
  - e.) Starting seal injection booster pumps as required.
  - f.) Starting heater drain pumps.
  - g.) Starting condenser circulating pumps as required.
  - h.) Adjust drain valves as required.
7. Maintain safe, efficient Unit operation by:
  - a.) Visually inspecting on periodic patrol unit component equipment located in basement. Service as required.
  - b.) Observing and recording local indications of pressure, temperature, level flow, vibration, etc., as required.
  - c.) Answering alarms and checking as required.
  - d.) Performing routine tests of generator gas system as required.
  - e.) Filtering turbine oil as required.
  - f.) Maintaining generator gas pressure as required.
  - g.) Operating condensate cooler as required.
8. Participate in shutdown of Unit by performing essentially same duties as in Item 6 above except in reverse.
9. In addition the Pump Operator is responsible for the following:
  - a.) General clean-up of equipment assigned.
  - b.) Routine servicing of equipment as scheduled by Lubrication Survey.

PUMP OPERATOR CONTINUEDDuties

- c.) Servicing and operation of unit sump and unwatering pumps.
- d.) Relieving of lower operating classifications.



UTILITY OPERATORQualifications

Must be a high school graduate or equivalent and should have had previous experience in other plant departments such as Coal Handling, Laboratory, Test Department, Clerical or Maintenance. Must be physically coordinated and capable of exerting physical strength required for manual operation of equipment.

Duties

Basically the Utility Operator under Shift Supervision provides the local service required to assist the Control Operators in safe, efficient operation of plant equipment. In effect, he is the eyes, ears, and hands of the control operator outside the Control Room. He is responsible for the following:

1. Provide visual and listening patrol of plant areas where assigned.
2. Provide Fire-Watch service in areas assigned and assist in fire-fighting where required.
3. Assist Control Operator in placing Units in service by:
  - a.) Preparing Boiler for service by visually inspecting furnace, ash hopper, soot hoppers, burners, fans, preheaters, preheater oil pumps, dampers, precipitators, oil lighting equipment, pulverizer mills, feeders, bunkers, boiler circulating pumps, drums, associated valves and piping to determine that equipment is ready for service. Service equipment as required. Adjust valves, dampers, etc., as required for proper operation.
  - b.) Preparing Turbine for service by visually inspecting turbine, turbine controls, turbine auxiliary equipment (turning gear, oil system, shaft sealing system) generator, voltage regulating equipment, generator gas coolers and valving, generator seal oil system, excitors, collectors, generator bus, transformer, steam

UTILITY OPERATOR CONTINUEDDuties

- b.) leads, steam lead drain valves, turbine drain valves, extraction piping valves and drains to determine that equipment is ready for service. Service equipment as required. Adjust valves, etc., as required for proper operation.
  - c.) Preparing Condenser for service by visually inspecting intake, intake screens, intake racks, condenser circulating water pumps, intake tunnel, water boxes, circulating water inlet valves, vent valves, circulating water outlet valves, discharge tunnel condenser neck seal, air off-take piping to air ejector and vacuum pump to determine that equipment is ready for operation. Service equipment as required. Adjust valves, etc., for proper operation.
  - d.) Preparing Condensate and Feedwater Cycle for service by visually inspecting Hotwell, Condensate Pumps, Condensate Coolers, Surge Tanks, Surge Tank Pumps, Auxiliary Condensate Pumps, Air Ejectors, Feedwater Heaters, Heater Drain Pumps, Boiler Feed Pumps, Condensate Recirculating System, Related Valves, Piping, etc., to determine that equipment is ready for operation. Service equipment as required. Adjust valves, etc., as required for proper operation.
4. Assist Control Operator in start-up of Unit by:
- a.) Charging Circulating Water System.
  - b.) Operating boiler circulating pumps and valving to establish boiler water circulation.
  - c.) Establishing ash hopper seal preparatory to establishing air flow.
  - d.) Performing local manual operations required for placing preheaters in service.
  - e.) Establishing oil light off fire. Adjust as required. Service burners as required.
  - f.) Sealing turbine shaft and establishing condenser vacuum.

UTILITY OPERATOR CONTINUEDDuties

- g.) Surveillance of Superheater and Reheater Tube temperatures and adjusting bleeds as required.
  - h.) Warming Steam Piping.
  - i.) Warming Turbine.
  - j.) Performing local manual operations required for placing mills in service.
  - k.) Rolling turbine and bringing to speed as directed by Shift Supervisor.
  - l.) Closing required electrical disconnects, etc., under Shift Supervision preparatory to paralleling Unit.
  - m.) Establishing normal operation arrangement of steam lead, turbine shell, extraction line drains, heater drains, heater vents, leak-offs, etc.
  - n.) Removing oil light off fire and adjusting auxiliary air as required.
  - o.) Placing Dust Collectors in service.
  - p.) Inspecting equipment as stated above. Service as required.
5. Assist Control Operator in maintaining safe, efficient operation of Units by:
- a.) Visually inspecting on periodic patrol all boiler, turbine, condenser, condensate and feedwater cycle components and auxiliary equipment. Service as required.
  - b.) Visually inspecting furnace walls for slagging condition. Operate soot blowing equipment as required.
  - c.) Removing soot and ashes as required. Disposing of mill tailings as required.
  - d.) Observing and recording local indications of pressure, temperature, level, flow, vibration, etc., as required.

UTILITY OPERATOR CONTINUEDDuties

- e.) Maintaining adequate circulating water flow by operation of rack rake and intake screens as required.
  - f.) Answering alarms and checking as required.
  - g.) Performing all routine tests of boiler, turbine, generator, generator gas system, and generator seal oil system controls, interlocks, alarms, etc. as required.
  - h.) Maintaining generator gas cooling by local manual operation of coolers as required.
  - i.) Maintaining generator gas pressure as required.
  - j.) Filtering turbine oil as required.
6. Assist Control Operator in removing Units from service. Duties are essentially the same as under Item 4 above except in reverse.
7. In addition the Utility Operator is responsible for the following:
- a.) General cleanup of equipment assigned.
  - b.) Routine servicing of equipment as scheduled by Lubrication Survey.
  - c.) Required Substation switching under Shift Supervision.
  - d.) Receipt of Fuel Oil Deliveries.
  - e.) Loading of Fly Ash Trucks and Railroad Cars.
  - f.) Washing Air Preheaters.
  - g.) Servicing and operation of other plant auxiliary equipment such as air compressors, service pumps, make-up system, sump pumps, unwatering pumps, etc., as required.
  - h.) Isolation of auxiliary equipment for maintenance.
  - i.) Relieving Gate Attendant as required.
  - j.) Conducting visitors as required.

LEARNERQualifications

Must be high school graduate. Must be physically coordinated and capable of exerting physical force required in the performance of duties.

Duties

The Learner Classification is the entrance classification into any of the station departments. He is to assist in the performance of any work in his department as directed and to prepare himself for promotion.

COAL HANDLING FOREMANQualifications

Must be High School Graduate or previous satisfactory performance as Coal Handling Operator. Must have Supervisory capability.

Duties

The Coal Handling Foreman supervises the routine coal handling operation. He is to:

1. Plan and execute daily coal handling operation to efficiently unload, stockpile or reclaim coal as required to insure plant production.
2. Maintain continuing surveillance of coal handling equipment to insure safe operation.
- ✓ 3. Maintain schedules of routine servicing of all coal handling equipment.
- ✓ 4. Maintain time records of all coal handling employees including satisfactory scheduling of vacation, holidays, etc.
5. Exercise close surveillance of all coal handling personnel to insure that all operations are being conducted safely.
- ✓ 6. Insure through prompt, proper clean up of all coal handling equipment that no fire hazards are permitted.
7. Insure through daily inspections that coal storage pile is properly sloped, terraced, and arranged to provide protection to equipment and provide satisfactory supply of reclaimable coal.
8. Attend to the care of men working in exposed locations during inclement weather or under severe conditions.
- ✓ 9. Work closely with maintenance supervision to schedule maintenance of coal handling equipment and to insure the safety of maintenance personnel when working on coal handling equipment.
- ✓ 10. Maintain an accurate log coal handling operations.
11. Evaluate employees under his supervision for merit reviews and promotion

## COAL EQUIPMENT OPERATOR

### Qualifications

Must have been Coal Handling Operator.

Must have proven his ability and willingness to perform every job in coal handling.

### Duties

Same as coal handling operator - in addition he must be able to handle every job in coal handling.

COAL HANDLING OPERATORQualifications

Must be high school graduate or previous satisfactory performance as Coal Handling Helper. Must be physically coordinated and capable of exerting physical strength required in performance of duties.

Duties

The Coal Handling Operator is responsible for the operation of all coal handling equipment to unload, stockpile, or reclaim coal and for the servicing and clean-up of coal handling equipment. Specifically these duties are:

1. When sworn, serve as Weighmaster and insure through maintenance of accurate records and weighing procedures that coal is unloaded correctly as charged.
2. Operate Car Dumper, Locomotives, Tractors, Conveyors, Trippers, Samplers, and other coal handling equipment.
3. Service and clean all coal handling equipment. Clean all structures.
4. Serve as Fire-Watch in all coal handling structures where working and assist in fire-fighting where needed.
5. Assist maintenance personnel in maintenance of coal handling equipment.
6. Assist in training of new, lower classification coal handling employees.



COAL HANDLING HELPERQualifications:

Must be a high school graduate. If employed prior to September 1, 1965, the company will accept in lieu of a high school diploma a passing score on the regular Wonderlic and Mechanical AA tests given to new employees. Must be physically coordinated and capable of exerting physical strength required in performance of duties.

Duties:

The Coal Handling Helper assists in conducting all coal handling operations. He is to:

1. Operate Tractors, Trippers, Samplers, Locomotives, and other coal handling equipment.
2. Assist Weighmaster in operation of car dumper and maintenance of accurate records.
3. Assist in servicing and clean-up of all coal handling equipment.
4. Assist in fire-fighting when needed.
5. Assist in maintenance of coal handling equipment.

MACHINISTQualifications

Must be a high school graduate or previous satisfactory performance as Mechanic B. Competence in operation of machine tools. Should have supervisory potential.

Duties

The Machinist must not only be able to perform as the Mechanic A but he must also be competent in:

1. Using precision measuring tools and calculating clearances.
2. Reading blueprints.
3. Making shop sketches.
4. Operation of lathes, shaper, milling machine, radial drill, and other shop tools.
5. Hand finishing of surfaces, bearings, joints, etc.
6. Magnafluxing and dye testing of parts, etc.
7. Metal spraying.

In addition the machinist should assist in the training of new, lower classification maintenance personnel.

ELECTRICIANQualifications

Must be high school graduate or previous satisfactory performance as Mechanic B or equivalent training at a technical training school. Should have supervisory potential.

Duties

The Electrician must not only be able to perform as the Mechanic A but must also be competent in:

1. Knowledge of Principles of Electricity - both AC and DC.
2. Knowledge of electrical circuitry.
3. Overhaul of electric motors, switchgear etc.
4. Trouble shooting of electrical equipment, control circuits, etc.
5. Overhaul of accessory electrical equipment, welding machines, etc.
6. Maintaining and servicing electric motors, circuit breakers, switchgear, etc.

In addition the Electrician should assist in the training of new, lower classification maintenance personnel.

WELDERQualifications

Must be high school graduate or previous satisfactory performance as Mechanic B. Competence in gas cutting and welding and electric arc welding. Should have supervisory potential.

Duties

The Welder must not only be able to perform as the Mechanic A but must also be competent in:

1. Using acetylene torch.
2. Acetylene Welding.
3. Inert Gas Welding.
4. Electric Arc Burning.
5. Electric Arc Welding.
6. Determining correct welding specifications for welding alloys normally encountered on job.
7. Stress Relieving.

In addition the welder should assist in the training of new, lower classification maintenance personnel.

MECHANIC AQualifications

Must be high school graduate or previous satisfactory performance as Mechanic B.

Duties

The Mechanic A is a repairman in every sense of the word. He should be able to, as directed by Maintenance Supervision, take a repair crew and assemble the necessary tools, rigging, parts, etc., required to:

1. Overhaul pumps such as boiler feed, boiler circulating, heater drain, service water, sump, etc.
2. Overhaul pulverizer mills, feeders, and exhausters fans.
3. Overhaul air compressors.
4. Overhaul tractors, trucks, diesel engines, etc.
5. Overhaul air preheaters, baskets, drives, oil systems, etc.
6. Repair fans, dust collectors, soot blowers, soot removal systems, boiler tubes, boiler casing, duct work, expansion joints, piping, valves, gage glasses and other related boiler equipment.
7. Overhaul turbine valves, governors, pumps, controls, etc. Under direction of turbine specialist.
8. Replace piping systems.
9. Clean out ash lines, soot lines, soot hoppers, etc., when required.
10. Overhaul auxiliary plant equipment such as air compressors, elevators, cranes, motor operated windows, vent fans, etc.
11. Assist in the training of new, lower classification maintenance employees.

In addition the Mechanic A should be able to analyze repair problems and report to supervision methods of correcting repetitive repair problems, improving maintenance techniques, etc. He should keep appropriate notes, clearances, etc., to document repair projects.

MECHANIC BQualifications

Must be a high school graduate or previous satisfactory performance as Repairman or equivalent training at Technical Training School.

Duties

The Mechanic B should be proficient in the use of hand tools, powered tools, force multiplying devices, etc., and have sufficient knowledge of maintenance procedures, techniques, etc., and plant equipment that he may be entrusted with minor jobs without close supervision. He should be able to:

1. Read Instruction Books, and interpret drawings.
2. Erect scaffolding as required.
3. Pack and repair valves.
4. Pack pumps.
5. Replace mill liners.
6. Replace exhaustor liners.
7. Reblade exhaustor fans.
8. Rebuild mill journals.
9. Replace mill bull rings.
10. Replace, repair or rebuild ash piping, jet pumps, etc.
11. Replace coal crusher grinding elements.
12. Repair insulation.
13. Replace threaded pipe and fittings.
14. Paint.
15. Prepare boiler tubes for welding.
16. Make repairs to other miscellaneous equipment such as door closers, windows, building siding, coal handling equipment, etc.

REPAIRMANQualifications

Must be high school graduate or equivalent. Must be physically coordinated. Must be capable of exerting physical strength required in the performance of duties.

Duties

The Repairman is the entering classification of the Maintenance Group. The Repairman is to provide assistance to maintenance crews in the performance of maintenance work. He is to prepare himself for advancement to Mechanic B by:

1. Developing competence in the use of hand tools.
2. Developing competence in the use of force multiplying, load lifting devices such as chain falls, come-a-longs, hydraulic jacks, air hoists, fork lifts, etc.
3. Developing competence in the use of powered tools such as air grinders, air drills, disc sanders, air hammers, etc.
4. Developing competence in rigging required in maintenance of equipment.
5. Acquiring a general knowledge of maintenance procedures, techniques, parts inventory, stores inventory procedures, etc.

TESTMANQualifications

College Degree in Engineering or in Science or previous satisfactory performance as Test Technician. Should possess supervisory potential.

Duties

The Testman is the highest of the Test Classifications. It is, therefore, one which requires skill and judgment. The Testman is responsible for routine testing and evaluation of performance of plant equipment. Specifically he should be able to:

1. Conduct, evaluate, and report results of routine tests such as heater performance, enthalpy drop, turbine output, Casing CO<sub>2</sub> Drop, Preheater leakage, etc.
2. Evaluate performance of equipment under automatic control and adjust controls to obtain optimum performance.
3. Prepare for and conduct Special Tests as required.
4. Prepare Special Reports such as EEI Summaries, Monthly performance summaries and other special reports as required.
5. Assist in the training of new test personnel in lower test classifications.

In addition to these specific duties the Testman is expected to provide guide service for various groups visiting the station.



LABMANQualifications

College Degree in one of the Sciences or previous satisfactory performance as Lab Technician. Should have supervisory potential.

Duties

The Labman is the highest Laboratory classification and he is expected to exercise a high degree of skill and diligence in the maintenance of high standards in all phases of Laboratory operation. He is the acting chemist in the absence of the Plant Chemist. His duties are:

1. Analyze results of all routine laboratory tests to determine any abnormality and to initiate corrective measures.
2. Be able to perform all routine laboratory operations such as water analysis, coal analysis, coal sampling, etc.
3. Perform special laboratory tests or conduct laboratory investigations as required.
4. Maintain to high standards of accuracy all laboratory water, coal, or other analysis apparatus.
5. Prepare all laboratory reagents, etc., as required.
6. Operate the plant water filtration system efficiently and safely at all times to protect health of all employees and insure plant production.
7. Operate the station make-up system to maintain high quality make-up at all times. Should be able to operate demineralizers and analyze their performance.
8. Be able to prepare chemical cleaning solutions and supervise their use in the routine cleaning of plant equipment.
9. Keep an accurate log of all laboratory operation.

LABMAN CONTINUEDDuties

10. Maintain inventory of all laboratory chemicals, reagents, and supplies.
11. Supervise Laboratory Operation in the absence of the Plant Chemist.
12. Assist in the training of new, lower classification laboratory personnel.

In addition to these duties the Labman is expected to provide guide service to visiting groups as required.

TEST TECHNICIANQualifications

Previous satisfactory performance as Test Assistant or have completed an Armed Forces or other technical school in an appropriate field.

Duties

The Test Technician shall be capable in the performance of all routine testing operations. In addition he should be proficient in the field of electronics or pneumatic instrumentation and control. Specifically his duties are:

1. Perform routine testing operations such as fly ash sampling, boiler gas analysis, Track Scale Tests, Belt-Meter Tests, etc.
2. Secure routine test data for performance evaluation.
3. Assist in setting up of special test equipment.
4. Operate special test equipment during tests and assist in securing required data.
5. Calibrate gages, instruments, recorders, etc., against standards. Maintain as required.
6. Maintain test equipment to standard.

In addition the Test Technician is expected to provide guide service to various groups visiting the station.

LABORATORY TECHNICIANQualifications

Previous satisfactory performance as Laboratory Assistant or equivalent such as college experience (2 years) or technical training school course.

Duties

The Laboratory Technician shall be capable in the performance of all routine laboratory operations. In addition he should successfully complete the N. C. Water Works School. His specific duties are

1. Perform all routine laboratory tests such as water analysis, coal analysis, coal sampling, etc.
2. Be able to interpret results of routine laboratory tests and determine corrective measures.
3. Operate and maintain the plant water filtration system efficiently and safely at all times to protect health of all employees and insure plant production.
4. Operate the station make-up system to maintain high quality make-up at all times.
5. Assist in the performance of all special laboratory tests.

In addition to these duties the Laboratory Technician is expected to provide guide service to visiting groups as required.

TEST ASSISTANTQualifications

Must be High School Graduate. Should be proficient in typing.

Duties

The Test Assistant must be able to perform all routine testing operations. Specifically his duties are:

1. Maintain accurate plant performance records as obtained from plant logs, charts, etc.
2. Compile data from plant records for regular routine reports.
3. Compile data from plant records for Special Reports as required.
4. File for future use all plant performance records, charts, correspondence, logs, etc.
5. Maintain inventory of all plant performance record forms, charts, ink supplies, pens, etc.
6. Call to attention of Supervisors any discrepancies in plant performance records, etc.
7. Assist operators in maintenance of clean ink record on all charts and instruments.
8. Assist in taking data during special tests when required.

In addition the Test Assistant is expected to provide guide service to visiting groups when required.

LAB ASSISTANTQualifications

Must be a high school graduate.

Duties

The Lab Assistant must be able to perform all routine laboratory operations. Specifically his duties are:

1. Perform daily routine water analysis.
2. Perform daily routine coal analysis.
3. Collect and process coal samples.
4. Conduct routine daily checks on water filtration system such as:
  - a.) Mix chemicals.
  - b.) Backwash filters.
  - c.) Adjust sludge bed as required.
  - d.) Adjust chemical feed as required.
5. Assist in the performance of all special laboratory tests.

In addition to these duties the Laboratory Assistant is expected to provide guide service to visiting groups as required.

LABOR FOREMANQualifications

Must be High School graduate. Must have supervisory capability. Should have had previous satisfactory performance in other plant classifications such as labor, coal handling, operations, maintenance, etc.

Duties

The Labor Foreman Supervises the plant labor force. He is to:

1. Plan daily utilization of plant labor force.
2. Maintain time records of all labor employees including satisfactory scheduling of vacations, holidays, etc.
3. Exercise close surveillance of all labor personnel to insure that all work is being done safely.
4. Attend to the care of men working in exposed locations during inclement weather or under severe conditions.
5. Maintain surveillance of plant entrance, entrance road, plant grounds, ash basin, railroad yard, substations, canal, discharge area, intake area and riverfront to insure that areas are clean and maintained.
6. Maintain surveillance of interior of plant to insure that all floors, platforms, catwalks, offices, etc. are clean.
7. Insure through prompt, proper clean up of all plant areas that no fire hazards are permitted.
8. Consult with other Supervisors to determine labor needs and plan work schedule accordingly.
9. Maintain adequate inventory of cleaning supplies, labor tools, etc.
10. Maintain adequate inventory of various supplies such as hydrogen, oxygen, acetylene, etc.
11. Conduct periodic inspection of plant vehicles, cleaning equipment, mowing equipment, boat, etc. Service as required. Schedule maintenance as required.

## AUXILIARY SERVICEMAN:

Qualifications

Must possess all the qualifications of laborer semi-skilled and in addition must have developed special skills or have the ability to assist in areas of operation and maintenance, as well as coal handling.

Duties

Same as duties of laborer semi-skilled and in addition:

- Assist in operation
- Assist in maintenance
- Assist in coal handling



LABORER (SEMI-SKILLED)Qualifications

Must be physically coordinated. Must be capable of exerting physical strength required in performance of duties. Must be able to read, write, and communicate with supervisors and fellow employees. Previous satisfactory performance as Laborer. Must possess valid Drivers License.

Duties

The Laborer (Semi-Skilled) is to perform all station labor service. In addition he must be able to operate and utilize equipment provided for cleaning, mowing, lifting, hauling, etc. His duties are the same as the Laborer (Common) and:

1. Safely operate company vehicles, truck station wagon, as required.
2. Operate floor sweeping machines, floor scrubbing machines, water pick-up machines, vacuum cleaning equipment as required in maintenance of building.
3. Operate mowing machines, tractors, truck, etc., required in maintenance of grounds.
4. Operate lift trucks as required in unloading and loading of trucks, cars, etc. and storage of material.
5. Operate plant motor boat as required.
6. Operate other tools such as jack hammers, tampers, air motors, grinders, etc as required.
7. Minor repairs to equipment utilized above.

LABORER (COMMON)Qualifications

Must be physically coordinated. Must be capable of exerting physical strength required in performance of duties. Must be able to read, write, and communicate with Supervisors and fellow employees.

Duties

The Laborer (Common) is to perform all station labor service. He is to:

1. Sweep, mop, scrub, hose, floors, etc., throughout plant, shop, warehouse, coal handling as required.
2. Mow, trim, rake, edge, clean lawns, trees, shrubbery, etc., as required.
3. Provide manual labor required in maintenance of railroad yard.
4. Provide manual labor required in moving, lifting, rigging, etc., plant equipment.
5. Provide manual labor required in uncovering, maintaining, and recovering buried piping.
6. Provide manual labor required in maintenance of plant paving.
7. Provide manual labor as required in cleaning of intake racks, tunnels, condensers, water boxes, hotwells, and other plant equipment.

WATCHMANQualifications

Must be a high school graduate or have previously served in other operating or maintenance classifications. Must be physically coordinated and must be physically capable for promotion into higher plant or operating classifications requiring physical strength.

Duties

The Watchman under Shift Supervision receives all visitors to the station. During evening and night hours he provides security and fire patrol for plant grounds, coal handling, and plant areas not frequented by operating personnel. To perform these duties he must:

1. Maintain at all times a friendly, courteous attitude toward all who approach the plant gate.
2. Receive and register all visitors and expedite their entrance into the plant or grounds.
3. Maintain pick-up records on fly ash sales.
4. Provide watch-clock patrol of grounds, coal handling, and certain plant areas as required. Maintaining watch for fire and trespasses.
5. Assist the Shift in any shift duties as directed by Shift Supervision.

The Watchman classification is an entrance classification into any of the higher plant classifications. The Watchman, therefore, should observe and prepare himself for promotion into higher classifications.

CLERKQualifications

Must be high school graduate. Must be proficient in typing.

Duties

The Clerk is responsible for the performance of all office clerical duties such as:

1. Processing Time Tickets and preparation of payroll.
2. Typing as required.
3. Processing of all Invoices, Order, Requisitions, etc.
4. Preparation of Coal Report.
5. Preparation of Expense Account.
6. Preparation of Stores Requisition Reports.
7. Preparation of Mail.
8. Receipt of Mail.
9. Filing of all correspondence, invoices, reports, etc.
10. Courteous reception of visitors.
11. Courteous reception of applicants.
12. Preparation of various personnel, wage, payroll, insurance, Workmen's Compensation, etc., reports.
13. Notification to employees of incoming telephone calls or messages.
14. Preparation of material transfers.
15. Preparation of Special Reports as required.
16. Communicating with Charlotte Office Clerical Staff.
17. Other non-specified duties at the direction of the Chief Clerk.

CHIEF CLERKQualifications

Must be high school graduate. Must be proficient in typing and should have had some training or experience in principles of accounting. Previous satisfactory performance as Clerk.

Duties

The Chief Clerk is responsible for the efficient, orderly operation the station office. He is responsible to the Station Superintendent for the confidential handling of all personnel wage, financial, cost, inventory records and correspondence. He is to:

1. Supervise all routine operations of the station office such as:
  - a.) Timekeeping and payroll.
  - b.) Processing of Requisitions, Orders, Material Received Notices, Invoices, etc.
  - c.) Stores Inventory Records.
  - d.) Coal Accounting.
  - e.) Expense Account.
  - f.) Filing.
  - g.) Typing.
  - h.) Mail receipt, dispatch, and distribution.
  - i.) Reception of Visitors.
  - j.) Reception of Applicants.
  - k.) Answering telephone.
2. Maintain all personnel records such as:
  - a.) Classifications - Seniority.
  - b.) Wage Progression.
  - c.) Hospitalization Insurance.

CHIEF CLERK CONTINUEDDuties

2.   d.) Life Insurance.
- e.) Stock Savings.
- f.) Employment and Termination.
3. Prepare, or assist in preparation, Special Report, budgets, etc., as required.
4. Assist in evaluation of Financial Statement, Cost, Records, etc.
5. Maintain adequate inventory of all forms, stationary, etc., as required.
6. Provide clerical assistance to plant departments as required.
7. Arrange for care of employees from other stations working at Allen on temporary basis.
8. Arrange for purchase and pick up of miscellaneous supplies and repair parts as required.
9. Arrange for medical care of injured employees.
10. Maintain adequate inventory of First Aid Supplies.
11. Other non-specified duties at the direction of Station Superintendent.

STOREKEEPERQualifications

Must be high school graduate or have previously served in other operating or maintenance classifications. Should be proficient at typing. Should have had previous satisfactory performance in other station classification such as Test, Operations, Maintenance, etc.

Duties

The Storekeeper is responsible for maintenance of the station stores inventory, general supplies, and tools. His duties are:

1. Maintain accurate records of stores inventory and prepare Stores Reports.
2. Receive all deliveries.
3. Distribute all general supplies.
4. Requisition general supply items as required.
5. Consult with Supervisors regarding inventories of spare parts.
6. Maintain Supply Room, Oil Storage House, and Warehouse.
7. Maintain supply of non-durable tools.
8. Maintain supply of lubricants.

In addition the Storekeeper should consult with supervision regarding methods of reducing stores inventory, retirement of obsolete items of stores, maintenance of running inventories, etc., to assist in minimizing the costs of Stores Inventory.

Steam Production Department  
Wage Brackets  
Effective January 1, 1967  
For all Stations

*Sheet 1 of 2*

<u>CLASSIFICATION</u>	<u>STARTING RATES</u>
<u>POWER STATION OPERATORS</u>	
Control Operator	3.565
Pump Operator	3.125
Utility Operator	2.565
Learner	1.995
<u>COAL AND MATERIAL HANDLING</u>	
Coal Handling Foreman	3.41
Coal Equipment Operator	2.965
Coal Handling Operator	2.445
Helper	2.185
Learner	1.995
<u>MAINTENANCE</u>	
Machinist	3.425
Electrician - Welder	3.445
Mechanic A	3.495
Mechanic B	2.97
Repairman	2.455
Learner	1.995
<u>TEST &amp; LABORATORY</u>	
Testman - Labman	3.18
Lab & Test Technician	2.665
Lab & Test Assistant	2.165
<u>LABOR</u>	
Labor Foreman	2.505
Auxiliary Serviceman	1.895
Laborer (Semi-Skilled)	1.565
Laborer (Common)	1.40
<u>MISCELLANEOUS</u>	
Watchman	1.775
Clerk	1.705
Chief Clerk	2.93
Storekeeper	2.61



## 2. (c) NUMBER OF WHITE EMPLOYEES IN EACH JOB CLASSIFICATION AS OF:

COAL HANDLING FOREMAN	TEST ASSISTANT	LABOR FOREMAN	MECHANIC "B"	LAB TECHNICIAN	HELPER
July 2, 1964	2	July 2, 1964	1	July 2, 1964	1
July 2, 1965	2	July 2, 1965	1	July 2, 1965	2
Oct. 20, 1966	2	Oct. 20, 1966	1	Oct. 20, 1966	0
Dec. 31, 1966	2	Dec. 31, 1966	1	Dec. 31, 1966	0
COAL HANDLING OPERATORS	LAB. MAN	WATCHMAN	MACHINIST	LAB. ASSISTANT	CONTROL OPERATOR
July 2, 1964	9	July 2, 1964	4	July 2, 1964	1
July 2, 1965	8	July 2, 1965	4	July 2, 1965	1
Oct. 20, 1966	9	Oct. 20, 1966	4	Oct. 20, 1966	1
Dec. 31, 1966	9	Dec. 31, 1966	4	Dec. 31, 1966	1
TEST MAN	CHIEF CLERK	WELDERS	ELECTRICIAN	REPAIRMAN	PUMPER
July 2, 1964	1	July 2, 1964	2	July 2, 1964	2
July 2, 1965	1	July 2, 1965	2	July 2, 1965	2
Oct. 20, 1966	1	Oct. 20, 1966	3	Oct. 20, 1966	3
Dec. 31, 1966	1	Dec. 31, 1966	3	Dec. 31, 1966	3
LAB TECHNICIAN	CLERK	MECHANIC "A"	STOREKEEPER	LEARNER	UTILITY OPERATOR
July 2, 1964	1	July 2, 1964	4	July 2, 1964	1
July 2, 1965	1	July 2, 1965	4	July 2, 1965	3
Oct. 20, 1966	1	Oct. 20, 1966	5	Oct. 20, 1966	1
Dec. 31, 1966	1	Dec. 31, 1966	5	Dec. 31, 1966	1

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QUESTION NO. 14			A and B		C	D	E
NAME	RACE	DATE OF APPLICATION	POSITION APPLIED FOR	TEST GIVEN AND RESULTS	APPLICANT'S QUALIFICATIONS	DISPOSITION OF APPLICATION	
Dwight K. Marvel *	White	8-2-65	Clerk	Wonderlic 22 Gen. Clerical 144	1 yr. business college passed required test	Not employed No job opening	
James M. Bragdon **	White	8-2-65	Clerk	Wonderlic 28 Gen. Clerical 152	1 semester college engineering passed required test	Not employed No job opening	
George H. Yates **	White	8-3-65	Shop or Clerk	Declined to take test	Applicant declined to complete Application	Not employed No job opening	
Gilmer E. Chilton **	White	8-6-65	Watchman	Declined to take test	Applicant declined to complete Application	Not employed No job opening	
Armit E. Roberts *	White	8-9-65	Operation	Declined to take test	Applicant declined to complete Application	Not employed No job opening	
Dewey R. Williams *	White	9-13-65	Shop	Declined to take test	Applicant declined to complete Application	Not employed No job opening	
Lemmie E. Joyce *	White	9-13-65	Shop	Declined to take test	Applicant declined to complete Application	Not employed No job opening	
Fred S. Chilton *	White	10-7-65	Plant work	Declined to take test	Unable to contact Applicant to complete Application	Not employed No job opening	
William T. Carter *	White	10-18-65	Shop	Declined to take test	High School Education 2 yrs. mechanical drawing	Not employed No job opening	
Thomas S. Chambers *	White	10-26-65	Shop	Declined to take test	High School by G.E.D., machine shop education, mechanical exp.	Not employed No job opening	
Willard L. Perdue *	White	11-4-65	Clerical	Declined to take test	High School Education	Not employed No job opening	
Samuel E. Roach *	Negro	11-5-65	Laborer	Declined to take test	Rejected. Physically disqualified, Thyroid trouble.	Not employed No job opening	
Donald P. Mitchell *	White	11-15-65	Operation	Declined to take test	High School Education. Power plt. exp. textile mill. Int. power sta.	Not employed No job opening	
Lester R. Lunsford *	White	11-29-65	Shop or Coal handling	Declined to take test	High School Education	Not employed No job opening	
John L. Wilson *	Negro	12-6-65	Laborer or Shop Helper	Declined to take test	3 yrs. high school Electrician's School 1 and 1/2 yrs.	Not employed No job opening	
Bobby D. Joyce *	White	12-8-65	Operation	Declined to take test	High School Education	Not employed/ No job opening	
James E. Denson, Jr. *	White	1-5-66	Stock Room or Clerical	Declined to take test	High School Education, 2 yrs. Bus. College, Clerk Va. Elec. Power Co.	Not employed No job opening	

C			D		E
NAME	RACE	DATE OF APPLICATION	POSITION APPLIED FOR	TEST GIVEN AND RESULTS	
Paul R. Corum *	White	1-12-66	Machinist	Declined to take test	DISPOSITION OF APPLICATION Not employed
Dewitt Howlett *	White	2-16-66	Shop or Operation	Declined to take test	No job opening
Jerry F. Somers *	White	3-9-66	Shop or Operation	Declined to take test	Not employed
David D. Pruitt *	White	4-19-66	Laborer	Declined to take test	Not employed
Louglass Keen *	White	4-25-66	Laborer or Watchman	Declined to take test	No job opening
Clarence W. Manley *	White	5-17-66	Watchman	Declined to take test	Not employed
Robert J. Denny *	White	5-25-66	Laborer	Declined to take test	No job opening
Bobby F. Wilson *	Negro	6-7-66	Maintenance	Declined to take test	Not employed
Irvin H. McAllister *	White	6-15-66	Operation or Maintenance	Declined to take test	No job opening
					Not employed
James H. Barrow *	White	6-15-66	Operation or Maintenance	Declined to take test	No job opening
Loyal N. Roberts *	Negro	6-21-66	Shop	Declined to take test	Not employed
Ronnie F. King *	White	7-26-66	Shop	Declined to take test	No job opening
Henry R. Golden *	White	7-27-66	Operation	Declined to take test	Not employed
					No job opening
Earl D. Estes *	White	8-1-66	Unknown	Declined to take test	Not employed
Franklin D. Johnson *	White	8-3-66	Coal Handling	Declined to take test	No job opening

Interviewed by:

[illegible]



15 (a) NAME	RACE	(b) Date Initial Job Category	Initial Starting Salary	(c) Job Classification From Which Promoted	Date Promoted	(d) Person Recommended Promotion	Person Approved Promotion	(e) Written or Oral Test If Given
D. E. Soyars	White	Helper	1.13	Pump Operator	3-21-66	Mr. J. D. Knight	A. C. Thies	None
Otis Shelton	White	Helper	1.13	Pump Operator	5-2-66	Mr. J. D. Knight	A. C. Thies	None
J. G. Neal	White	Helper	1.07	Pump Operator	5-16-66	Mr. J. D. Knight	A. C. Thies	None
M. Roach	White	Helper	1.22	Pump Operator	5-30-66	Mr. J. D. Knight	A. C. Thies	None
G. C. McClung	White	Watchman	1.25	Utility Operator	3-21-66	Mr. J. D. Knight	A. C. Thies	None
Clarence Amoriello	White	Repairman	1.19	Pump Operator	6-13-66	Mr. J. D. Knight	A. C. Thies	None
M. R. Hawkins	White	Helper	1.045	Helper	8-9-65	Mr. J. D. Knight	A. C. Thies	None
W. L. Smith	White	Learner	1.795	Learner	8-9-65	Mr. J. D. Knight	A. C. Thies	None
Jesse C. Martin	Negro	Laborer	.835	Semi-Skilled Laborer	8-8-66	Mr. J. D. Knight	A. C. Thies	None
H. C. Siegner	White	Learner	1.795	Learner	11-29-65	Mr. J. D. Knight	A. C. Thies	None
W. L. Clark	White	Learner	1.795	Learner	2-21-66	Mr. J. D. Knight	A. C. Thies	None
James L. Williams	White	Helper	1.03	Helper	8-23-65	Mr. J. D. Knight	A. C. Thies	None
J. G. Joyce	White	Clerk	1.385	Mechanic "B"	4-18-66	Mr. J. D. Knight	A. C. Thies	None
Ja. L. Martin	White	Helper	1.46	Mechanic "B"	5-30-66	Mr. J. D. Knight	A. C. Thies	None
J. Hower King	White	Watchman	1.31	Repairman	8-23-65	Mr. J. D. Knight	A. C. Thies	None
Eddie Broadnax	Negro	Com. Lab.	1.13	Common Laborer	3-21-66	Mr. J. D. Knight	A. C. Thies	None
Willie Griggs	Negro	Com. Lab.	1.17	Common Laborer	11-14-66	Mr. J. D. Knight	A. C. Thies	None
C. E. Purcell	Negro	Com. Lab.	1.17	Common Laborer	11-14-66	Mr. J. D. Knight	A. C. Thies	None
C. H. Parker	White	Watchman	1.25	Mechanic "A"	4-18-66	Mr. J. D. Knight	A. C. Thies	None

NAME	RACE	INITIAL DATE OF EMPLOYMENT	INITIAL JOB CATEGORY	INITIAL STARTING WAGES	PAY INCREASES & OR RATES OF EACH SUBSEQUENT TO 7-2-65	JOB CATEGORY AT TIME OF EACH PAY INCREASE SUBSEQUENT 7-2-65
Clarence Amoriello	White	2-13-52	Repairman	1.19	1-1-66 - \$.095 1-1-67 - .105	Pump Operator Clerk
Willie Boyd	Negro	11-8-48	Laborer	.80	1-1-66 - \$.045	S. S. Laborer
L. W. Brandon	White	5-4-48	Laborer	.75	11-15-65 - .125 - 6-27-66 - \$.06 - 10-31-66 - \$.14	C. H. Foreman
T. E. Black	White	10-16-48	Helper	.95	1-1-66 - \$.115	Control Operator
Junior Blackstock	Negro	4-24-48	Laborer	.75	11-10-65 - \$.025 - 1-1-66 - \$.045 9-6-65 - \$.035 - 1-1-66 - \$.045 3-21-66 - \$.03 - 9-19-66 - \$.04	S. S. Laborer Laborer Comm Laborer SS
Eddie Broadnax	Negro	2-13-61	Labor Comm	1.13		
C. R. Bridges	White	9-1-48	Comp. Operator	.95	1-1-66 - \$.095 - 9-19-66 - \$.06 8-9-65 - \$.04 11-15-65 \$.04 1-1-66 - \$.06 2-21-66 - \$.18 - 8-22-65 - \$.05	Pump Operator Learner Repairman
V. L. Clark	White	11-16-64	Learner	1.795		Electrician
Carlton H. Cox	White	5-9-49	Beginner	.90	1-1-66 - \$.115	
H. C. Corina	White	4-20-49	Water Boy	.60	1-1-66 - \$.095 - 9-19-66 - \$.06	Pump Operator
J. P. Dyer, Jr.	White	6-11-56	Clerk	1.445	1-1-66 - \$.07 - 1-24-66 - \$.05 - 8-22-66 \$.035 9-6-65 - \$.05 - 1-1-67 - \$.07 3-21-66 - \$.05 - 9-19-66 - \$.07	Test Tech. Repairman
W. T. Edwards	White	3-20-57	Watchman	1.31	10-4-65 - \$.05 - 1-1-66 - \$.07 4-4-66 - \$.05 - 10-3-66 - \$.05	Coal Handling Operator
J. E. Ferguson	White	11-25-56	Watchman	1.31	11-15-65 - \$.125 - 6-27-66 - \$.06 10-31-66 - \$.14	Coal Handling Foreman
F. I. Franklin	White	5-24-48	Mechanic	1.40	12-13-65 - \$.04 - 1-1-66 - \$.045 6-27-66 - \$.04 - 12-12-66 \$.04 - 1-1-67 - \$.06	Watchman
J. P. Farida	White	9-8-64	Watchman	1.525		
J. E. Fulcher	White	4-9-51	Helper	1.07	1-1-66 - \$.115 - 5-16-66 \$.06 - 11-16-66 - \$.06	Control Operator
Eddie Galloway	Negro	6-18-51	Laborer	.90	1-1-66 - \$.045 8-23-65 - \$.05 - 1-1-67 - \$.07 3-7-66 - \$.05 - 9-5-66 - \$.035	SS Laborer Lab. Tech.
P. E. Gressa	White	10-22-56	Clerk	1.445	10-4-65 - \$.05 - 10-31-66 \$.07 4-4-66 - \$.05 - 10-31-66 \$.05	Utility Operator
T. J. Willie	White	10-22-56	Clerk	1.445		

NAME	RACE	INITIAL DATE OF EMPLOYMENT	INITIAL JOB CATEGORY	INITIAL START-ING WAGES	PAY INCREASES & OR RATES OF PAY	JOB CATEGORY AT TIME OF LAST PAY INCREASE
W. S. Griggs	Negro	3-11-53	Laborer - Gen	1.17	11-15-65 - \$2.03 - 1-1-66 - \$2.045 11-21-66 - \$2.04	SS Laborer
David Hatchett	Negro	6-20-57	Laborer	1.00	11-15-65 - \$2.025 - 1-1-66 - \$2.045	SS Laborer
T. H. Haireston, Jr.	Negro	10-22-51	Laborer	.99	1-1-66	SS Laborer
R. W. Hutchins	White	9-18-39	Relief Operator	.30	10-4-65 - \$2.06 - 1-1-66 \$2.115 4-4-66 - \$2.06 - 10-3-66 \$2.035 - 1-1-67 - \$2.145	Chief Clerk
V. B. Hawkins	White	5-1-64	Helper	1.045	8-9-65 - \$2.205 - 1-1-66 - \$2.07 2-7-66 - \$2.05 - 8-9-66 - \$2.05	Utility Operator
T. W. Hudson	White	8-20-55	Helper	1.39	10-18-65 - \$2.06 - 1-1-66 - \$2.115	Welder
Clarence M. Jackson	Negro	1-29-51	Laborer	.80	1-1-66 - \$2.045	Laborer SS
M. J. Joyce	White	6-11-48	Police-man	2.15.00 Month	8-20-65 - \$2.05 - 1-1-66 - \$2.07 3-21-66 - \$2.05 - 8-19-66 - \$2.05	Coal Handling Operator
M. G. Joyce	White	11-28-55	Clerk	1.385	1-1-66 - \$2.095 1-18-66 - \$2.22 - 10-17-66 - \$2.06	Mechanic "B" Mechanic "A"
C. W. Joyce	White	6-16-65	Test Ass't	1.085	9-20-65 - \$2.085 - 12-13-65 \$2.05 1-1-66 - \$2.06 - 6-13-66 - \$2.05 - 11-21-66 - \$2.05	Test Assistant
J. E. Joyce	White	8-15-55	Helper	1.39	1-1-66 - \$2.07 - 9-19-66 - \$2.05	Utility Operator
I. L. Johnston, Jr.	White	10-1-56	Clerk	1.445	12-27-65 - \$2.05 - 1-1-66 - \$2.07 5-16-66 - \$2.025 - 11-14-66 - \$2.05	Utility Operator
P. A. Jumper	Negro	2-21-54	Laborer	1.00	11-15-65 - \$2.025 - 1-1-66 - \$2.045	Laborer - SS
Charlie B. Kellan	White	8-20-51	Clerk	1.15	8-23-65 - \$2.06 - 1-1-66 - \$2.115 3-7-66 - \$2.06 - 9-5-66 - \$2.015	Labman
W. E. Kellan	White	7-9-56	Watchman	1.31	10-4-65 - \$2.05 1-1-66 - \$2.07 - 9-19-66 - \$2.05	Utility Operator
J. Kester King	White	5-11-56	Watchman	1.31	8-23-65 - \$2.15 1-1-66 - \$2.095 2-21-66 - \$2.06 - 8-22-66 - \$2.06	Mechanic "B"
Delch Vay	White	1-22-51	Helper	1.07	11-15-65 - \$2.06 - 1-1-66 - \$2.115 5-16-66 - \$2.06 - 11-14-66 - \$2.06	Control Operator
Earl L. Martin	White	8-11-56	Helper	1.46	1-1-66 - \$2.095 5-30-66 - \$2.22 - 11-26-66 - \$2.06	Mech. "B" Mech. "A"
W. E. Martin	Negro	5-13-57	Laborer	1.00	11-15-65 - \$2.025 - 1-1-66 - \$2.045	Laborer SS

NAME	RACE	DATE OF BIRTH	INITIAL JOB	INITIAL START DATE	PAY INCREASES & OR WTS OF PAY INCREASES TO 7-2-65	JOB ANTICIPATED AT TIME OF 1964 PAY INCREASES FROM 7-2-65
Robert L. Martin, Jr.	White	4-1-53	Helper	1.22	9-6-65 - \$.06 - 1-1-66 - \$.095 3-20-66 - \$.06 - 9-19-66 - \$.06 - 11-28-66 - \$.06 11-15-65 - \$.025 - 1-1-66 - \$.045 8-8-66 - \$.265 - 11-11-66 - \$.04	Pump Operator Laborer - SS Learner
Nesse C. Martin	Negro	10-5-53	Laborer	.835		
Horace G. Myers	White	9-23-41	Repairman	.70	1-1-66 - \$.115	Welder
B. S. Martin	White	5-1-49	Helper	.95	1-1-66 - \$.115	Control Operator
H. I. Meadows	White	10-15-56	Watchman	1.31	9-20-65 - \$.05 - 1-1-66 - \$.095 3-21-66 - \$.05 - 9-19-66 - \$.05	Storekeeper
Sam McPeak	White	11-8-48	Truck Driver	.90	1-1-66	Control Operator
Robert L. Mitchell	White	8-1-49	Beginner	.85	9-20-65 - \$.05 - 1-1-66 - \$.07 5-21-66 - \$.05 - 9-19-66 - \$.05	Coal Handling Operator
G. C. Neelung	White	12-7-53	Watchman	1.25	1-1-66 - \$.07 3-21-66 - \$.095 - 9-19-66 - \$.06	Utility Operator Pump Operator
R. W. Norris	White	4-1-57	Watchman	1.31	1-1-66 - \$.045 - 3-7-66 - \$.05 9-5-66 - \$.05 - 1-1-67 - \$.065	Watchman
Frank L. McBride	White	3-22-49	Water Boy	.60	1-1-66 - \$.115	Control Operator
Joseph G. Neal	White	1-8-53	Helper	1.51	1-1-66 - \$.095 5-16-66 - \$.28 - 11-14-66 - \$.06	Pump Operator Control Operator
Jack F. O'Neil	White	4-9-51	Helper	1.28	10-4-65 - \$.05 - 1-1-66 - \$.07 4-4-66 - \$.05 - 10-3-66 - \$.05	Coal Handling Operator
Thomas J. Pratt	White	8-21-53	Helper	1.28	11-15-65 - \$.06 - 1-1-66 - \$.095 5-16-66 - \$.06 - 11-28-66 - \$.08	Pump Operator
William Russell	Negro	9-6-50	Laborer	.85	1-1-66 - \$.045	Laborer SS
C. F. Russell	Negro	6-17-63	Laborer Comm	1.17	11-15-65 - \$.03 1-1-66 - \$.045 5-16-66 - \$.045 11-14-66 - \$.04	Laborer Comm Laborer SS
W. J. Page	White	8-1-49	Helper	1.00	9-20-65 - \$.05 - 1-1-67 - \$.07 3-21-66 - \$.05 - 9-19-66 - \$.05	Coal Handling Operator
C. H. Parker	White	12-7-53	Watchman	1.25	1-1-65 - \$.115 4-18-66 - \$.065	Mechanic "A" Welder
"G. G. Pawlins, Jr.	White	4-22-57	Helper	1.52	10-11-65 - \$.05 - 1-1-66 - \$.07 1-4-66 - \$.05 - 10-3-66 - \$.05	Coal Handling Operator
Mrs. Virginia Ritchie	White	12-27-50	Clerk	1.03	1-1-66 - \$.06 - 7-11-66 - \$.05	Laboratory Assistant



NAME	RACE	DATE OF BIRTH	INITIAL JOB	INITIAL ST RT -	PAY INCREASES & OR RATES OF PAY	JOB CATEGORIES AT TIME OF PAY INCREASES & OR RATES OF PAY
N. P. Robinson	White	2-25-12	Turbine Oper.	1.10	1-1-66 - \$2.095	Mechanic "A"
James E. Peterson	White	12-1-10	Clerk	.90	9-6-65 - \$2.06 - 1-1-66 - .115	Control Operator
Wallace Beach	White	1-6-53	Helper	1.22	1-1-66 - \$2.095	Pump Operator
G. D. Balline	White	10-1-12	Laborer	1.10	5-20-65 - \$2.28 - 11-28-66 - \$2.06	Control Operator
Henry G. Strong	White	4-2-51	Helper	1.07	9-20-65 - \$2.075 - 3-21-66 - \$2.05	Labor Foreman
F. Sifford	White	11-16-11	Operator	.55	9-19-66 - \$2.10	Mechanic "A"
L. W. Soyars	White	6-25-55	Helper	1.15	1-1-66 - \$2.115	Mechanic "A"
N. S. Spangler	White	5-24-56	Watchman	1.11	10-4-65 - \$2.05	Utility Operator
Orin D. Watson	White	9-21-51	Helper	1.13	1-1-66 - \$2.045 - 3-7-66 - \$2.05	Watchman
F. E. Soyars, Jr.	White	7-30-51	Helper	1.13	9-5-66 - \$2.05 - 1-1-67 - \$2.065	Pump Operator
Norman P. Ogle	White	12-1-10	Machinist	1.10	1-1-66 - \$2.095	Control Operator
W. C. Steerner	White	3-10-61	Learner	1.795	5-22-66 - \$2.28 - 10-31-66 - \$2.06	Pump Operator
Harry H. Stewart	White	10-17-10	Beginner	.85	1-1-66 - \$2.115	Control Operator
W. L. Smith	White	6-22-61	Learner	1.795	11-29-65 - \$2.27 - 1-1-66 - \$2.07 - 5-30-66 - \$2.05	Machinist
S. P. Via	White	11-11-55	Clerk	1.385	8-9-65 - \$2.04 - 11-29-65 - \$2.27 - 1-1-66 - \$2.07 - 5-30-66 - \$2.05	Learner
James S. Turner	Black	2-27-18	Laborer	.80	9-20-65 - \$2.05 - 1-1-66 - \$2.07	Coal Handling Operator
Alfred Vernon	White	3-5-56	Watchman	1.31	3-21-66 - \$2.05 - 9-19-66 - \$2.05	Utility Operator
F. E. Thurason	White	6-1-12	Turbine Oper.	1.10	8-29-65 - \$2.355 - 1-1-66 - \$2.07	Utility Operator
P. P. Vernon	White	10-11-51	Watchman	1.25	2-7-66 - \$2.05 - 8-8-66 - \$2.05	Utility Operator
					1-1-66 - \$2.07 - 9-19-66 - \$2.05	Utility Operator
					1-1-66 - \$2.015	Laborer - SS
					10-1-65 - \$2.05 - 1-1-66 - \$2.07	Coal Handling Operator
					4-4-66 - \$2.05 - 10-3-66 - \$2.05	Mechanic "A"
					1-1-66 - \$2.115	Watchman
					1-3-66 - \$2.045 - 3-7-66 - \$2.05 - 1-1-67 - \$2.065	Watchman



NAME AND ADDRESS	DATE	(S) NAME	RACE	DATE OF INITIAL EMPLOYMENT	PRICE JOB CLASSIFICATION
Control Operator	3-21-66	L. E. Solari	White	7-30-51	Pump Operator
Control Operator	5-6-66	Otis Shelton	White	9-24-51	Pump Operator
Control Operator	5-24-66	J. G. Neal	White	1-8-53	Pump Operator
Control Operator	5-20-66	Mallory Bosch	White	4-6-53	Pump Operator
Pumper	3-21-66	G. C. McClung	White	12-7-53	Utility Operator
Clark	6-13-66	Clarence Amoriello	White	2-13-52	Pump Operator
Utility Operator	8-9-65	M. R. Hawkins	White	5-4-64	Helper
Utility Operator	8-9-65	M. L. Smith	White	6-29-64	Learner
Learner	8-6-66	Jesse C. Martin	Negro	10-5-53	Semi-Skilled Laborer
Repairman	11-29-65	H. C. Siegner	White	8-10-64	Learner
Repairman	2-21-66	W. L. Clark	White	11-16-64	Learner
Control Handling Operator	8-23-65	James L. Williams	White	9-18-50	Helper
Mechanic "A"	4-18-66	J. G. Joyce	White	11-28-55	Mechanic "B"
Mechanic "A"	5-30-66	Judy L. Martin	White	9-4-56	Mechanic "B"
Mechanic "B"	8-23-65	J. Horner King	White	10-15-56	Repairman
Semi-Skilled Laborer	3-21-66	Eddie Broadnax	Negro	2-13-61	Common Laborer
Semi-Skilled Laborer	11-14-66	Wallie Orings	Negro	3-11-63	Common Laborer
Semi-Skilled Laborer	11-14-66	C. R. Purcell	Negro	6-3-63	Common Laborer
Valver	4-18-66	C. H. Parker	White	12-7-53	Mechanic "A"

# TEST OF MECHANICAL COMPREHENSION

FORM AA

George K. Bennett, Ph.D.

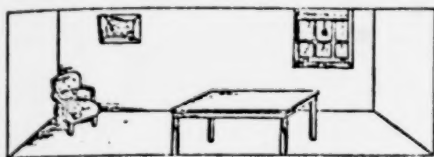
84b



## DIRECTIONS

Fill in the requested information on your ANSWER SHEET.

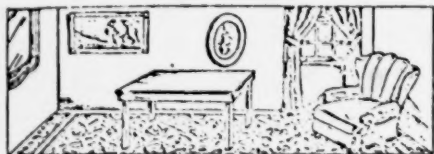
Now line up your answer sheet with the test booklet so that the "Page 1" arrow on the booklet meets the "Page 1" arrow on the answer sheet. Then look at Sample X on this page. It shows pictures of two rooms and asks, "Which room has more of an echo?" Because it has neither rugs nor curtains, there is more of an echo in room "A"; so blacken the space under "A" on your answer sheet. Now look at Sample Y and answer it yourself. Fill in the space under the correct answer on your answer sheet.



A

X

PAGE



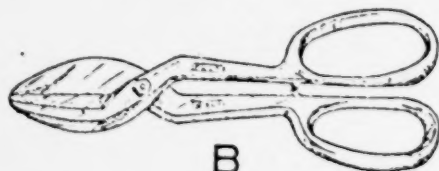
B

Which room has more of an echo?



A

Y



B

Which would be the better shears for cutting metal?

On the following pages there are more pictures and questions. Read each question carefully, look at the picture, and fill in the space under the best answer on the answer sheet. Make sure that your marks are heavy and black. Erase completely any answer you wish to change. Be certain that you use the right column on the answer sheet for each page. The arrow on the page should meet the arrow on the answer sheet.

DO NOT MARK THIS BOOKLET—PUT YOUR ANSWERS ON THE ANSWER SHEET.

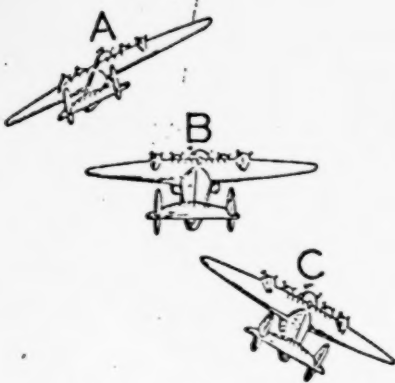
Drawings by Helen Gebryel

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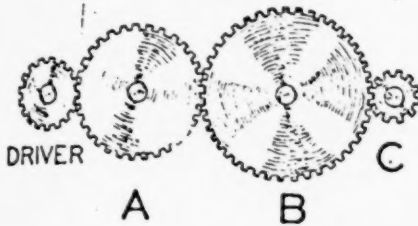
The test contained in this booklet has been designed for use with answer forms published or authorized by The Psychological Corporation. If other answer forms are used, The Psychological Corporation takes no responsibility for the meaningfulness of scores.

85b



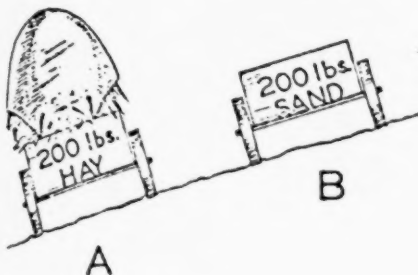
1

Which airplane is turning to the right?



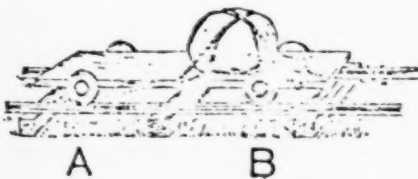
2

Which gear will make the most turns in a minute?



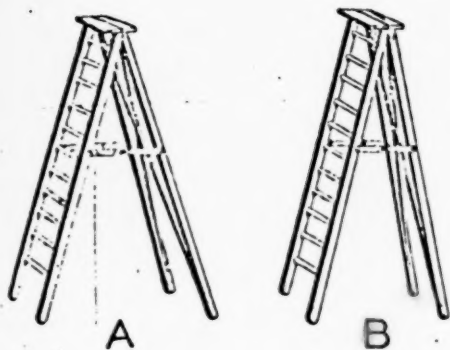
3

Which cart is more likely to tip over on the hillside?



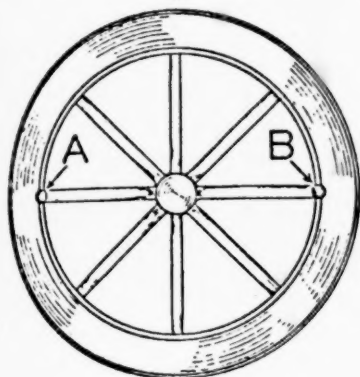
4

Which wheel presses harder against the rail?



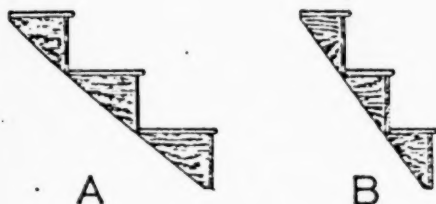
5

Which stepladder is safer to climb on?



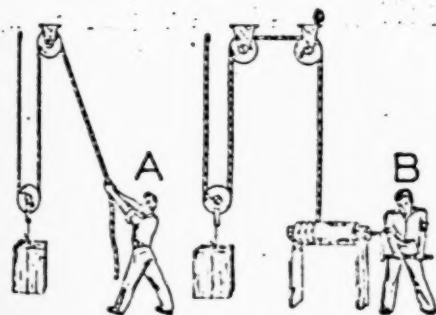
6

Which spot on the wheel travels faster?



7

Which staircase would take less room?



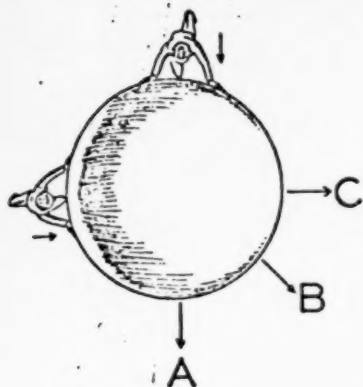
8

Which man can lift more weight?



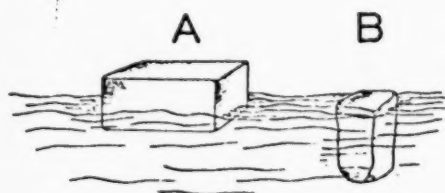
87b

PAGE



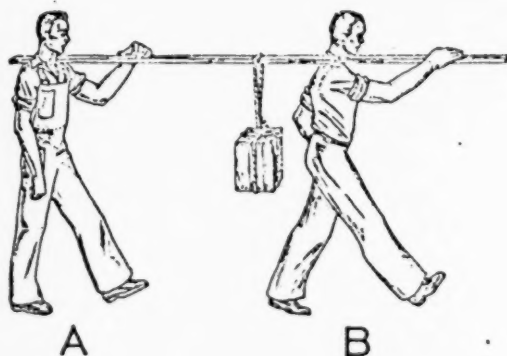
9

If the two men are pushing against the pushball in the directions shown, in which direction is it most likely to go?



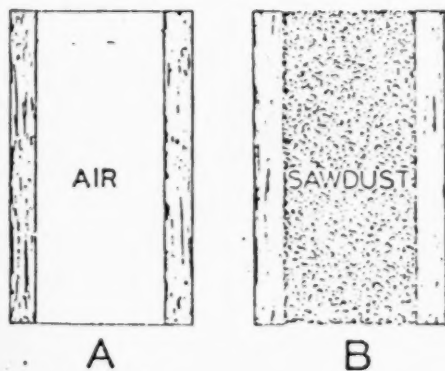
10

Which of these objects is made of the heavier material?



11

Which man carries more weight?



12

Which wall will keep a house warmer in winter?

88b



13

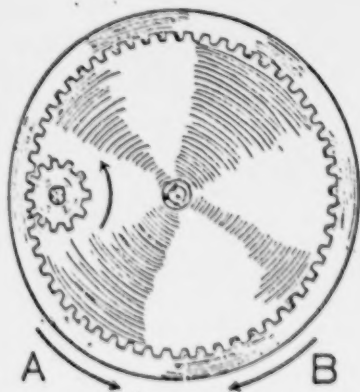
Which horse will be harder to hold?

PAGE 5



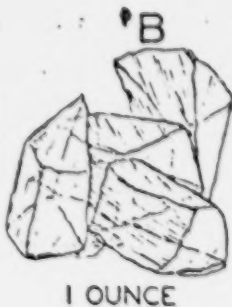
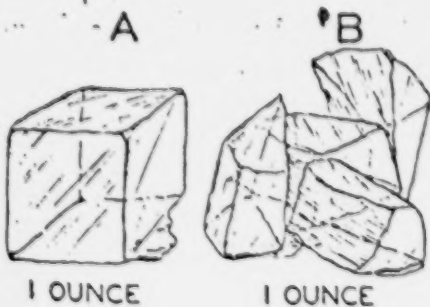
14

Which man has to pull harder?



15

If the small wheel goes in the direction shown, in which direction will the large wheel go?

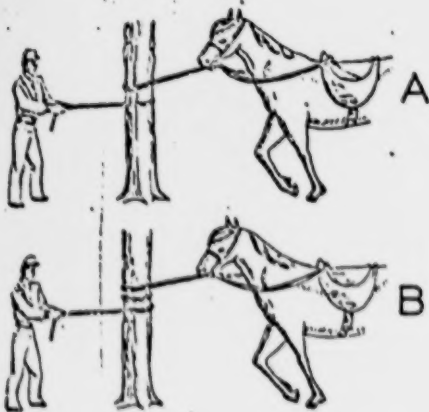


16

Which ounce of ice will cool a drink more quickly?



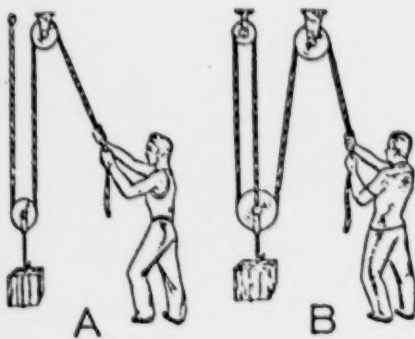
89b



13

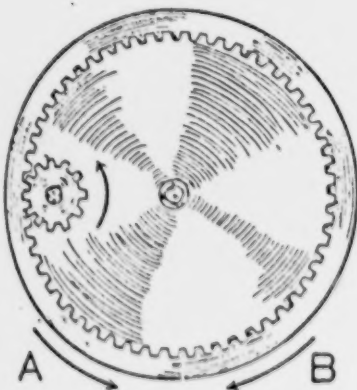
Which horse will be harder to hold?

PAGE 5



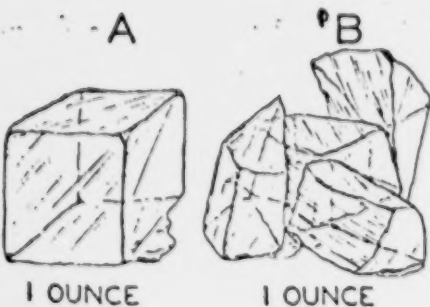
14

Which man has to pull harder?



15

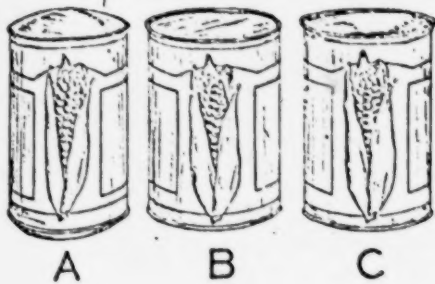
If the small wheel goes in the direction shown, in which direction will the large wheel go?



16

Which ounce of ice will cool a drink more quickly?

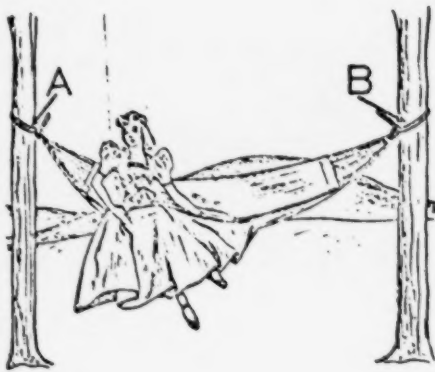
90b



17

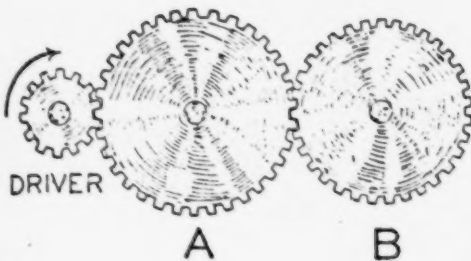
If a can is heated it is most likely to look like:

PAGE



18

Which rope is under more strain?



19

Which gear will turn the same way as the driver?

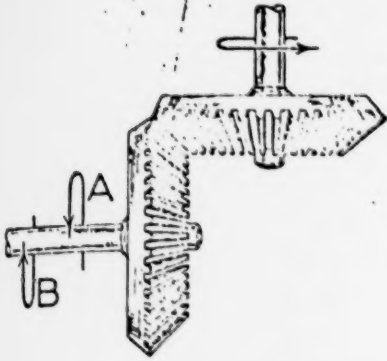


20

If the two boys weigh the same, which of them can balance a heavier boy on the other end of his see-saw?

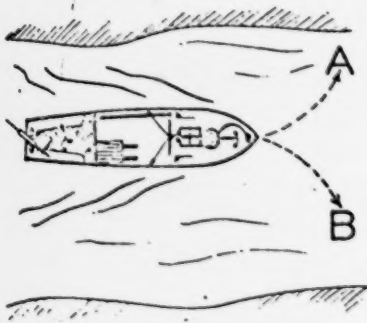


91b



21

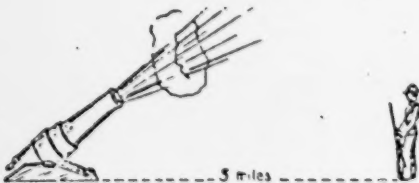
If the upper wheel moves in the direction shown, in which direction does the other one move?



PAGE 7

22

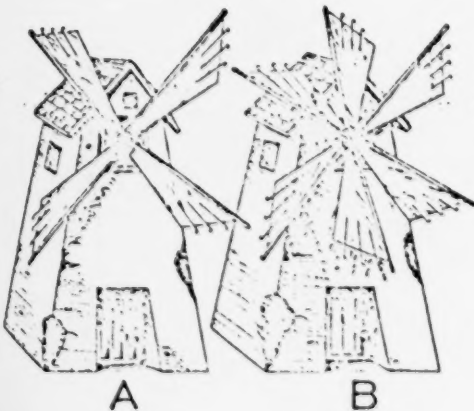
Which way will the boat go?



23

The man will hear the sound of the cannon:

- A—before he sees the flash,
- B—after he sees the flash,
- C—at the same time as he sees the flash.



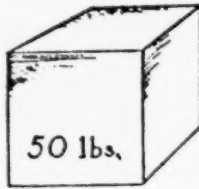
24

Which windmill will do more work?

92b



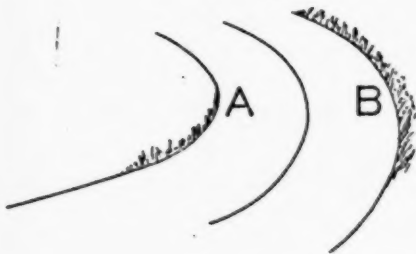
A



B

25

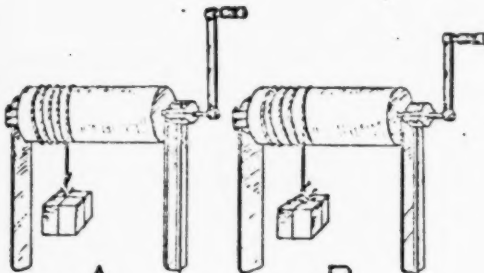
Which of these solid blocks will be the harder to tip over?



26

Which side of the road should be built higher?

PAGE 8



A

B

27

With which windlass can a man raise the heavier weight?



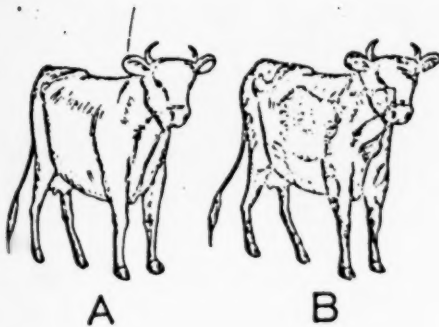
A



B

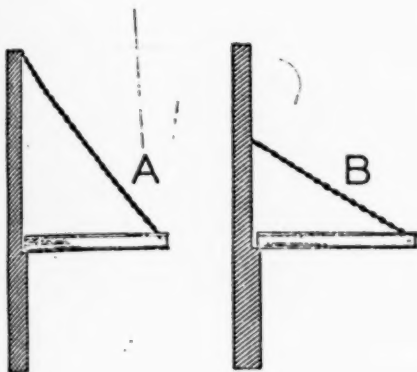
28

Which frying pan will be easier to handle?



29

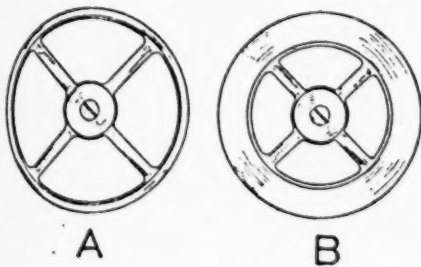
Which cow would be harder to see from an airplane?



30

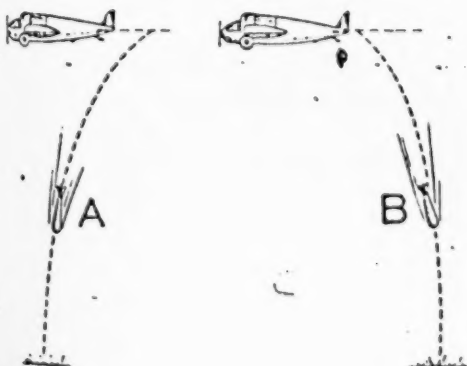
Which chain has more strain put upon it?

PAGE 9



31

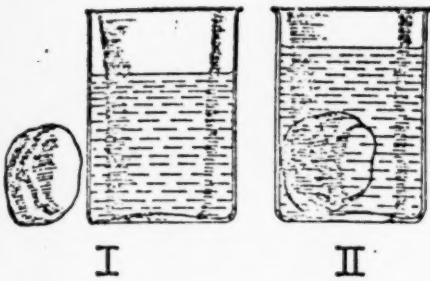
Which wheel will keep going longer after the power has been shut off?



32

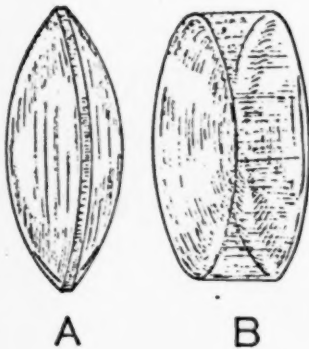
Which picture shows the way a bomb falls from a moving airplane if there is no wind?

94b



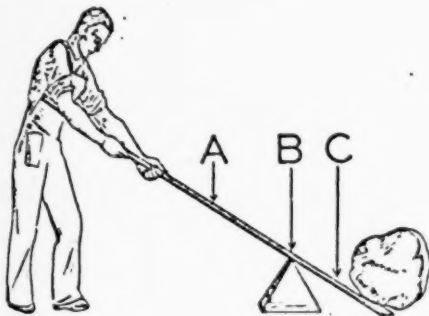
33

If the rock and tank of water together in picture I weigh 100 pounds, what will they weigh in picture II?



34

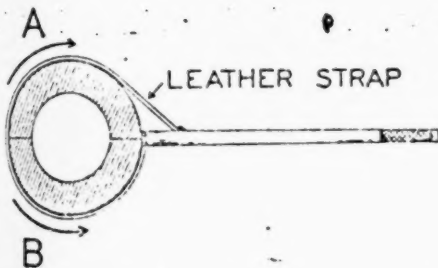
If light travels more slowly through glass than through air, which shape lens will make objects look larger?



35

PAGE 10

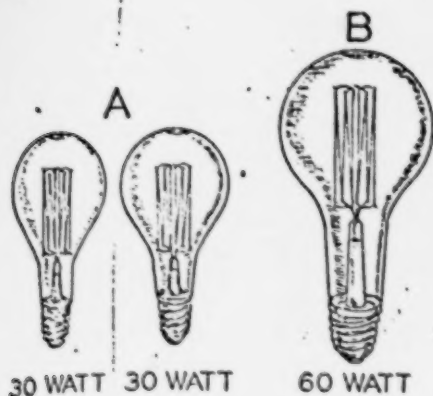
If a man were lifting a stone with this crowbar, at which point would the bar be most likely to break?



36

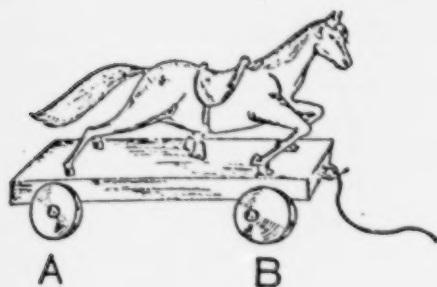
This wrench can be used to turn the pipe in direction:

95b



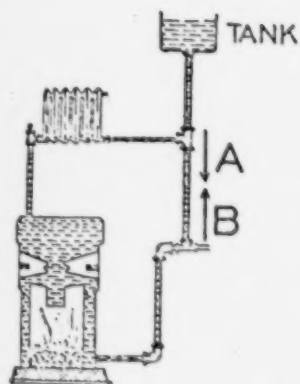
37

Which will use more current: the two bulbs at A, or the one bulb at B?



38

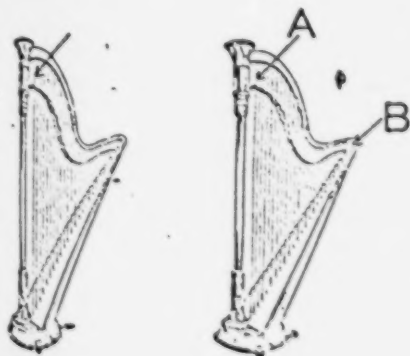
Which end of the toy horse will buck more when it is pulled along the floor?



39

In which direction does the water in the right hand pipe go?

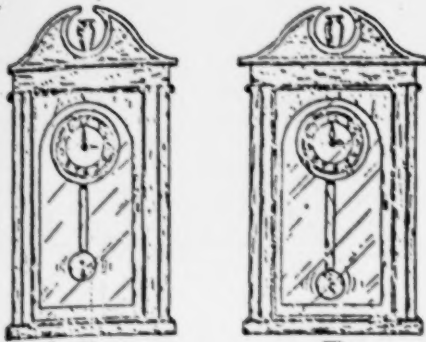
PAGE 11



40

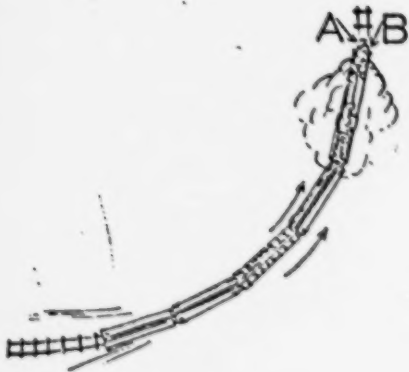
If the string shown by the arrow is plucked on the first harp, which string on the second harp will be more likely to sound?

96b



A

B



A B



A



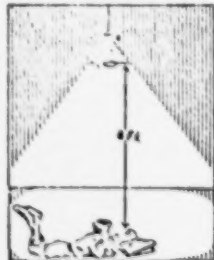
B

50 WATT BULB

100 WATT BULB



A



B

41

Which of these clocks will tick faster?

42

If the track is exactly level, on which rail does more pressure come?

43

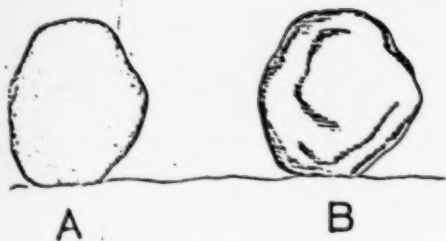
If there are no clouds, on which night will you be able to see more stars?

PAGE 1

44

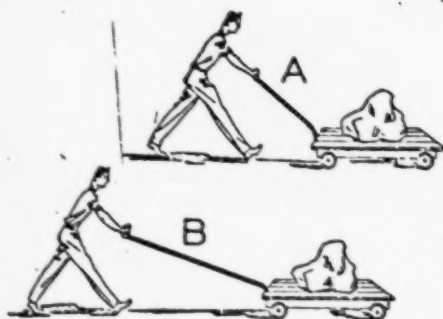
Which boy gets more light on the pages of his book?





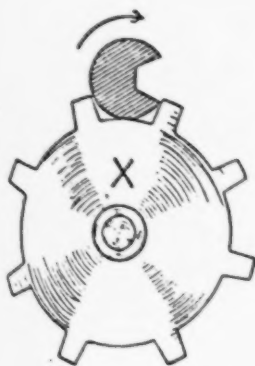
45

Which rock will get hotter in the sun?



46

Which way can the man push the heavier load?



47

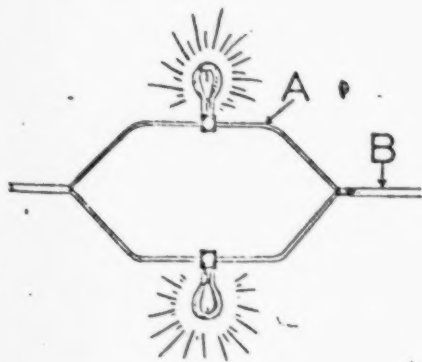
The top of the wheel "X" will go:

A—steadily to the right,

B—steadily to the left,

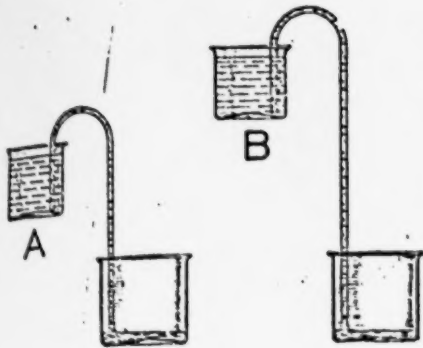
C—by jerks to the left.

PAGE 13



48

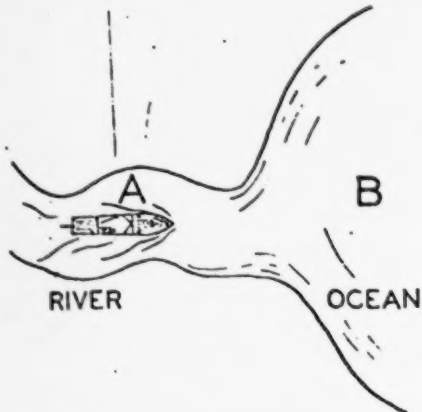
Which wire carries more current?



49

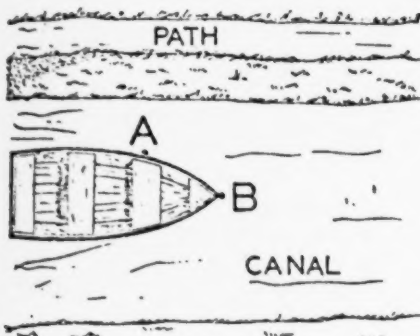
Which tank will empty faster?

50



At which point will the boat be lower in the water?

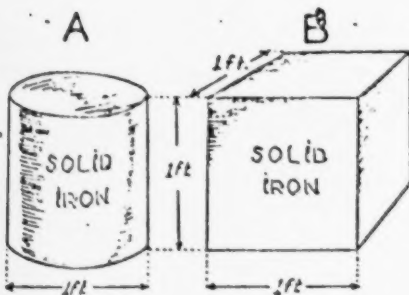
51

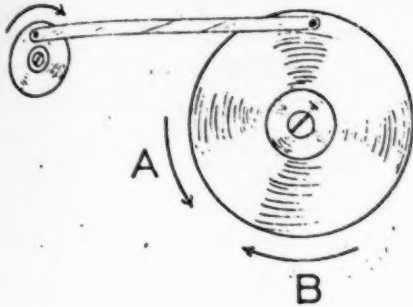


To pull this boat along the canal, at which point is it better to attach the rope?

52

Which weighs more?

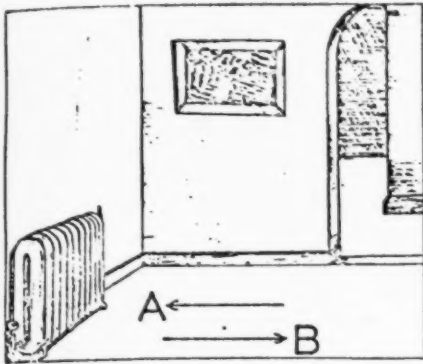




53

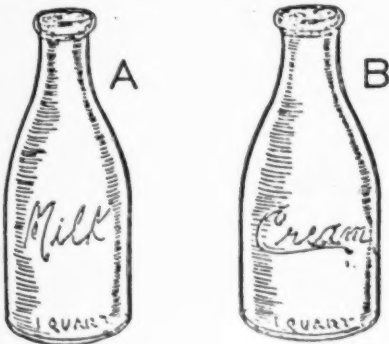
When the little wheel turns around, the big wheel will:

- A—turn in direction A,
- B—turn in direction B,
- C—move back and forth.



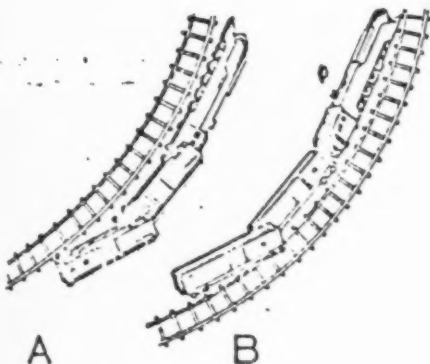
54

Which arrow shows the way the air will move along the floor when the radiator is turned on?



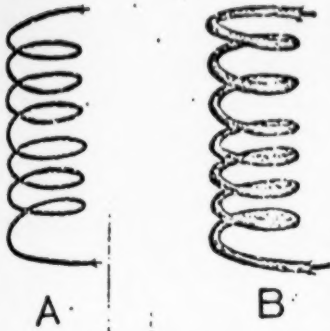
55

Which weighs more?



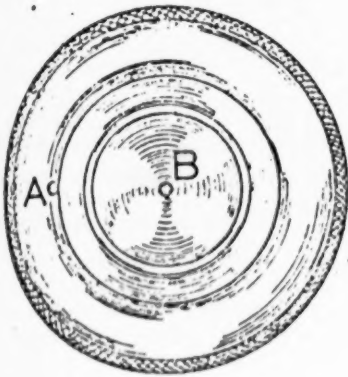
56

Which of these is the more likely picture of a train wreck?



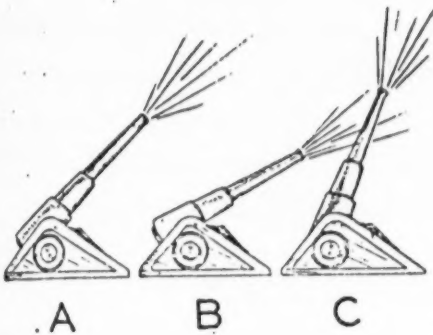
57

Which of these wires offers more resistance to the passage of an electric current?



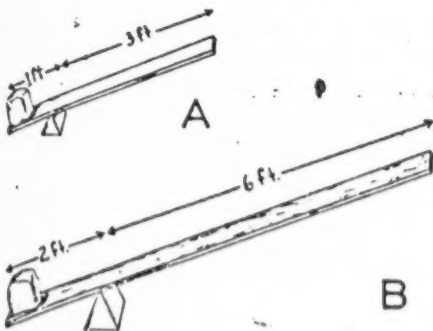
58

Which spot on the wheel travels faster?



59

Which cannon will shoot farthest?



60

With which arrangement can a man lift the heavier weight?

22(a)  
WONDERLIC

101b

# PERSONNEL TEST

FORM I

NAME ..... Date .....  
(Please Print)

READ THIS PAGE CAREFULLY. DO EXACTLY AS YOU ARE TOLD.  
DO NOT TURN OVER THIS PAGE UNTIL YOU ARE  
INSTRUCTED TO DO SO.

This is a test of problem solving ability. It contains various types of questions. Below is a sample question correctly filled in:

REAP is the opposite of

1 obtain, 2 cheer, 3 continue, 4 exist, 5 sow ..... [ 5 ]

The correct answer is "sow." (It is helpful to underline the correct word.) The correct word is numbered 5. Then write the figure 5 in the brackets at the end of the line.

Answer the next sample question yourself.

Gasoline sells for 23 cents per gallon. What will 4 gallons cost? ..... [ --- ]

The correct answer is 92¢. There is nothing to underline so just place "92¢" in the brackets.

Here is another example:

MINER MINOR — Do these words have

1 similar meaning, 2 contradictory, 3 mean neither same nor opposite? ..... [ --- ]

The correct answer is "mean neither same nor opposite" which is number 3 so all you have to do is place a figure "3" in the brackets at the end of the line.

When the answer to a question is a letter or a number, put the letter or number in the brackets.  
All letters should be printed.

This test contains 50 questions. It is unlikely that you will finish all of them, but do your best. After the examiner tells you to begin, you will be given exactly 12 minutes to work as many as you can. Do not go so fast that you make mistakes since you must try to get as many right as possible. The questions become increasingly difficult, so do not skip about. Do not spend too much time on any one problem. The examiner will not answer any questions after the test begins.

Now, lay down your pencil and wait for the examiner to tell you to begin!

*Do not turn the page until you are told to do so.*

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PRINTED IN U.S.A.

1. The Eleventh month of the year is  
1 October, 2 May, 3 November, 4 February ..... [ ]
2. SEVERE is the opposite of  
1 harsh, 2 stern, 3 tender, 4 rigid, 5 unyielding ..... [ ]
3. In the following set of words, which word is different from the others?  
1 certainty, 2 dubiousness, 3 assuredness, 4 confidence, 5 sureness ..... [ ]
4. Answer by printing YES or NO. Does B.C. mean "before Christ"? ..... [ ]
5. In the following set of words, which word is different from the others?  
1 sing, 2 call, 3 chatter, 4 hear, 5 speak ..... [ ]
6. PURE is the opposite of  
1 immaculate, 2 indecent, 3 incorrupt, 4 innocent, 5 classical ..... [ ]
7. Which word below is related to chew as smell is to nose?  
1 sweet, 2 stink, 3 odor, 4 teeth, 5 clean ..... [ ]
8. How many of the five pairs of items listed below are exact duplicates? ..... [ ]  

Sharp, M. G.	Sharpe, M. G.
Fiedler, E. H.	Fiedler, E. H.
Connor, M. J.	Conner, M. J.
Woesner, O. W.	Woerner, O. W.
Soderquist, P. E.	Soderquist, B. E.
9. CLEAR is the opposite of  
1 plain, 2 obvious, 3 explicit, 4 distinct, 5 dim ..... [ ]
10. A dealer bought some cars for \$3500. He sold them for \$5500, making \$50 on each car. How many cars were involved? ..... [ ]
11. ADOPT ADEPT — Do these words have  
1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [ ]
12. Lemons sell at 3 for 15 cents. How much will 1½ dozens cost? ..... [ ]
13. How many of the six pairs of items listed below are exact duplicates? ..... [ ]  

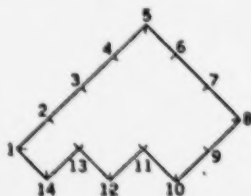
5296	5296
66986	69686
834426	834426
7354256	7354256
61197172	61197172
83238324	83238234
14. FAMILIAR is the opposite of  
1 friendly, 2 old, 3 strange, 4 aloof, 5 different ..... [ ]
15. Which number in the following group of numbers represents the smallest amount?  
6 .7 9 36 .31 5 ..... [ ]
16. Suppose you arranged the following words so that they made a true statement. Then print the last letter of the last word as the answer to this problem.  
of salt the life Love is ..... [ ]
17. One of the numbered figures in the following drawings is most different from the others. What is the number in that drawing? ..... [ ]



18. Two men caught 36 fish; X caught 8 times as many as Y. How many fish did Y catch? ..... [ ]
19. REFLECT REFLEX — Do these words have  
1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [ ]
20. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets, if false, put an (F) in the brackets.  
moss A stone gathers rolling ..... [ ]
21. Assume the first 2 statements are true. Is the final one: (1)true, (2>false, (3)not certain?  
Most progressives are business men. Most progressives are Republicans. Some business men are Republicans. .... [ ]
22. Two of the following proverbs have similar meanings. Which ones are they? ..... [ ]  
  1. Straws show which way the wind blows.
  2. An empty sack can't stand straight.
  3. No doctor at all is better than three.
  4. All is not gold that glitters.
  5. Too many cooks spoil the broth.
23. Look at the row of numbers below. What number should come next?  
73 66 59 52 45 38 ? ..... [ ]
24. The hours of daylight and darkness in SEPTEMBER are nearest equal to the hours of daylight in 1 June, 2 March, 3 May, 4 November ..... [ ]
25. Assume the first 2 statements are true. Is the final one: (1)true, (2>false, (3)not certain?  
Bill is the same age as Mary. Mary is younger than John. Bill is younger than John [ ]
26. A train travels 75 feet in ¼ second. At this same speed, how many feet will it travel in 5 seconds? ..... [ ]
27. Five pounds of meat sells for \$2.00; how many pounds can you buy for 80 cents? ..... [ ]
28. STRETCH SPREAD — Do these words have  
1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? ..... [ ]



29. This geometric figure can be divided by a straight line into two parts which will fit together in a certain way to make a perfect square. Draw such a line by joining two of the numbers. Then write the numbers as the answer. [ ]



30. Assume the first 2 statements are true. Is the final one: (1) true, (2) false, (3) not certain? [ ]

Fred greeted Mary. Mary greeted Ned. Fred did not greet Ned.

31. An automobile that costs \$2490 has decreased  $33\frac{1}{3}\%$  in value by the end of the season. What was its value at that time? [ ]

32. One of the numbered figures in the following drawings is most different from the others. What is the number in that drawing? [ ]



33. A skirt requires  $2\frac{1}{2}$  yards of material. How many can be cut from 42 yards? [ ]

34. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? No doctor at all is better than three. The more doctors, the more sickness. [ ]

35. ENLARGE AGGRANDIZE — Do these words have

1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? [ ]

36. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? It is always well to moor your ship with two anchors. Don't put all of your eggs in one basket. [ ]

37. For \$3.60 a grocer buys a case of oranges which contains 12 dozen. He knows that two dozen will spoil before he sells them. At what price per dozen must he sell the good ones to gain  $\frac{1}{3}$  of the whole cost? [ ]

38. PRETENSIONS PRETENTIOUS — Do these words have

1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? [ ]

39. When potatoes are selling at \$.0125 a pound, how many pounds can you buy for fifty cents? [ ]

40. One number in the following series does not fit in with the pattern set by the others. What should that number be?  $\frac{1}{4}$   $\frac{1}{6}$   $\frac{1}{8}$   $\frac{1}{10}$   $\frac{1}{12}$   $\frac{1}{14}$   $\frac{1}{16}$   $\frac{1}{18}$   $\frac{1}{20}$  [ ]

41. IMAGE IMAGINARY — Do these words have

1 similar meanings, 2 contradictory, 3 mean neither same nor opposite? [ ]

42. How many square yards are there in a floor which is 6 feet long by 21 feet wide? [ ]

43. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? All good things are cheap, all bad things very dear. Goodness is simple; badness is manifold. [ ]

44. A soldier shooting at a target hits it  $12\frac{1}{2}\%$  of the time. How many times must he shoot to be certain he will register 100 hits? [ ]

45. One number in the following series does not fit in with the pattern set by the others. What should that number be?  $\frac{1}{4}$   $\frac{1}{6}$   $\frac{1}{8}$   $\frac{1}{10}$   $\frac{1}{12}$   $\frac{1}{14}$   $\frac{1}{16}$   $\frac{1}{18}$   $\frac{1}{20}$  [ ]

46. Three men form a partnership and agree to divide the profits equally. X invests \$4500, Y invests \$3500, Z invests \$2000. If the profits are \$2400, how much less does X receive than if the profits were divided in proportion to the amount invested? [ ]

47. Two of the following proverbs have similar meanings. Which ones are they? [ ]

1. Perfect valor is to do without witnesses what one would do before all the world.
2. Valor and boastfulness never buckle on the same sword.
3. The better part of valor is discretion.
4. True valor lies in the middle between cowardice and rashness.
5. There is a time to wink as well as to see.

48. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 mean neither similar nor contradictory? After the event even a fool is wise. No man ever became wise by chance. [ ]

49. Three of the following 5 parts can be fitted together in such a way to make a triangle. Which 3 are they? [ ]



50. In printing an article of 24,000 words, a printer decides to use two sizes of type. Using the larger type, a printed page contains 900 words. Using the smaller type, a page contains 1200 words. The article is allotted 21 full pages in a magazine. How many pages must be in the smaller type? [ ]

NAME	RACE	JOB TRANSFERRED FROM	DATE OF TRANSFER	JOB TRANSFERRED TO	(1) DATE OF INITIAL EMPLOYMENT
D. M. Soyars	White	Pump Operator	3-21-66	Control Operator	7-30-51
Chris Shilton	White	Pump Operator	5-2-66	Control Operator	9-24-51
J. G. Neal	White	Pump Operator	5-11-66	Control Operator	1-8-53
L. Bosch	White	Pump Operator	5-30-66	Control Operator	4-6-53
G. C. McClurg	White	Utility Operator	3-21-66	Pump Operator	12-7-53
C. Amicello	White	Pump Operator	6-13-66	Clerk	2-13-52
M. R. Hawkins	White	Helper	8-9-65	Utility Operator	5-4-64
W. L. Smith	White	Learner	8-9-65	Utility Operator	6-29-64
Joseph C. Martin	Negro	Semi-Skilled Laborer	8-8-66	Learner	10-5-53
H. C. Siegner	White	Learner	11-29-65	Repairman	8-10-64
W. L. Clark	White	Learner	2-21-66	Repairman	11-16-64
James L. Williams	White	Helper	8-23-65	C. H. Operator	9-18-50
J. G. Joyce	White	Mechanic "B"	4-18-66	Mechanic "A"	11-28-55
J. .. Martin	White	Mechanic "B"	5-30-66	Mechanic "A"	9-4-56
J. Edgar King	White	Repairman	8-23-65	Mechanic "B"	10-15-56
Paulie Broadnax	Negro	Common Laborer	3-21-66	Semi-Skilled Laborer	2-13-61
Willie Orsery	Negro	Common Laborer	11-14-66	Semi-Skilled Laborer	3-11-63
C. D. Parcell	Negro	Common Laborer	11-14-66	Semi-Skilled Laborer	6-3-63
C. W. Parker	White	Mechanic "A"	4-18-66	Welder	12-7-53



(4) WHITE PERSONS EMPLOYED BY THE COMPANY AT DAN RIVER STEAM STATION

NAME	DATE OF INITIAL EMPLOYMENT	INITIAL JOB CATEGORY	INITIAL STARTING SALARY	(b) PRESENT JOB	PRESENT SALARY
Clarence Asciello	2-13-52	Repairman	1.19	Clerk	3.245
L. W. Brandon	5-4-48	Laborer	.75	C. H. Foreman	3.745
T. F. Black	10-16-48	Helper	.85	Control Operator	3.66
C. B. Bridges	9-1-48	Comp. Operator	.95	Pump Operator	3.20
M. L. Clark	11-16-64	Learner	1.795	Repairman	2.40
Car. M. W. Cox	5-9-49	Beginner	.90	Electrician	3.66
H. G. Dalina	4-20-49	Waterboy	.60	Pump Operator	3.20
J. D. Dyer Jr.	6-11-56	Clerk	1.445	Test Tech.	2.835
H. T. Edwards	3-20-57	Watchman	1.31	Repairman	2.67
J. E. Ferguson	11-26-56	Watchman	1.31	C. H. Operator	2.79
E. L. Franklin	5-24-48	Mechanic	1.40	C. H. Foreman	3.745
J. R. Farris	9-8-64	Watchman	1.525	Watchman	1.875
J. Fletcher	4-0-51	Helper	1.07	Control Operator	3.66
R. W. Greene	10-22-56	Clerk	1.445	Lab. Tech.	2.835
T. Y. Little	10-22-56	Clerk	1.445	Utility Operator	2.885
G. A. Hutchins	9-18-39	Relief Operator	.30	Chief Clerk	3.645
H. B. Hutchins	5-4-64	Helper	1.945	Utility Operator	2.535
L. M. Hudson	8-29-55	Helper	1.39	Welder	3.66
H. J. Joyce	6-14-48	Policeman	\$215.00 Month	C. H. Operator	2.79
J. G. Joyce	11-28-55	Clerk	1.385	Mechanic "A"	3.41

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Cont.

NAME	DATE OF INITIAL EMPLOYMENT	INITIAL JOB CATEGORY	INITIAL STARTING SALARY	(b) PRESENT JOB	PRESENT SALARY
C. W. Joyce	6-16-65	Test Asst.	1.95	Test Asst.	2.21
J. E. Joyce	8-15-55	Helper	1.39	Utility Operator	2.885
L. L. Johnston Jr.	10-1-56	Clerk	1.445	Utility Operator	2.885
Charles R. Kallam	8-20-51	Clerk	1.15	Test Man	3.66
H. R. Kallam	7-9-56	Watchman	1.31	Utility Operator	2.885
J. Homer King	5-11-56	Watchman	1.31	Mechanic "B"	2.965
Ralph Loy	1-22-51	Helper	1.07	Control Operator	3.66
Judy L. Martin	9-4-56	Helper	1.46	Mechanic "A"	3.41
Robert L. Martin Jr.	6-1-53	Helper	1.22	Pump Operator	3.20
Horace O. Myers	8-23-41	Repairman	.70	Welder	3.66
R. S. Martin	5-4-48	Helper	.95	Control Operator	3.66
H. L. Meadows	10-15-56	Watchman	1.31	Storekeeper	2.885
Ed. McPeak	11-8-48	Truck Driver	.90	Control Operator	3.66
Robert L. Mitchell	3-1-49	Beginner	.85	C. H. Operator	2.79
C. G. McClung	12-9-53	Watchman	1.25	Pump Operator	3.00
H. W. Morris	4-1-57	Watchman	1.31	Watchman	1.925
Frank L. Morris	3-22-49	Waterboy	.60	Control Operator	3.66
Joseph G. Muel	1-8-53	Helper	1.07	Control Operator	3.48
John D. O'Dell	4-9-51	Helper	1.28	C. H. Operator	2.79
Robert P. Pratt	8-21-53	Helper	1.28	Pump Operator	3.20

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NAME	DATE OF INITIAL EMPLOYMENT	INITIAL JOB CATEGORY	INITIAL STARTING SALARY	(b) PRESENT JOB	PRESENT SALARY
H. L. Potts	8-1-49	Helper	1.00	C. H. Operator	2.79
C. R. Parker	12-7-53	Watchman	1.25	Welder	3.66
M. G. Rawlins Jr.	4-22-57	Helper	1.52	C. H. Operator	2.79
Mrs. Virginia Ritchie	12-27-50	Clerk	1.03	Lab Assistant	2.43
W. R. Robinson	2-25-42	Turbine Operator	.40	Mechanic "B"	3.13
as E. Robertson	12-1-49	Clerk	.95	Control Operator	3.66
Mallory Poach	4-6-53	Helper	1.22	Control Operator	3.48
C. R. Rollins	10-4-42	Laborer	.40	Labor Foreman	2.61
Henry G. Strong	4-2-51	Helper	1.07	Mechanic "A"	3.595
W. F. Sifford	11-16-41	Operator	.55	Mechanic "A"	3.595
J. M. Soyars	6-25-56	Helper	1.46	Utility Operator	2.885
W. S. Spangler	5-28-56	Watchman	1.31	Watchman	1.925
Clas Ray Shelton	9-24-51	Helper	1.13	Control Operator	3.48
D. E. Soyars Jr.	7-30-52	Helper	1.13	Control Operator	3.48
William R. Self	12-1-49	Machinist	1.30	Machinist	3.66
M. C. Siegler	8-10-64	Learner	1.795	Repairman	2.45
Harry J. Stewart	10-17-49	Beginner	.85	C. H. Operator	2.79
M. L. Smith	6-29-64	Learner	1.795	Utility Operator	2.535
S. D. Vitz	11-14-55	Clerk	1.385	Utility Operator	2.885
Alfred Vernon	3-5-56	Watchman	1.31	C. H. Operator	2.79

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2(a) Cont.

NAME	DATE OF INITIAL EMPLOYMENT	INITIAL JOB CATEGORY	INITIAL STARTING SALARY	(b) PRESENT JOB	PRESENT SALARY
F. E. Thompson	6-1-42	Turbine Operator	.40	Mechanic "A"	3.595
A. F. Vernon	10-11-54	Watchman	1.25	Watchman	1.925
James L. Williams	9-20-50	Helper	1.13	C. H. Operator	2.44
V. A. White	11-21-55	Clerk	1.305	Testman	3.215
John White	7-6-49	Laborer	.75	Control Operator	3.66
Thomas E. Woods	8-28-50	Helper	1.03	Machinist	3.66
Curtis Lee Walsh	5-16-49	Electrician	1.20	Electrician	3.66

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12. HOURS PERSONNEL EMPLOYED BY THE COMPANY AT DAN FERRY STATION

10 OF OCTOBER 20, 1966

(2) LIST OF INITIAL  
EMPLOYMENT

NAME	DATE OF INITIAL EMPLOYMENT	INITIAL JOB CATEGORY	INITIAL STARTING SALARY	(6) PRESENT JOB CATEGORY	PRESENT SALARY
Walter Egan	11-9-59	Laborer	.80	* S.S. Laborers	1.645
John Taylor	12-27-48	Laborer	.80	* S.S. Laborers	1.645
William Purcell	9-6-50	Laborer	.85	* S.S. Laborers	1.645
G. W. Jackson	1-26-52	Laborer	.80	* S.S. Laborers	1.645
Paula Bellows	6-21-51	Laborer	.90	* S.S. Laborers	1.645
Paula Watson	10-22-51	Laborer	.99	* S.S. Laborers	1.645
George Martin	10-5-53	Laborer	.935	Learner	1.95
Arthur Blackstock	6-21-48	Laborer	.75	* S.S. Laborers	1.645
Arthur Jones	2-21-54	Laborer	1.00	* S.S. Laborers	1.645
R. L. Norton	5-19-57	Laborer	1.00	* S.S. Laborers	1.645
Paula Watson	6-21-57	Laborer	1.00	* S.S. Laborers	1.645
William	2-23-62	Common Laborer	1.13	* S.S. Laborers	1.56
William	3-21-63	Common Laborer	1.17	Common Laborer	1.53
G. W. Purcell	5-15-63	Common Laborer	1.17	Common Laborer	1.53

## Plaintiff's Exhibit 14

[28] \* \* \*

Q. I'm talking about the testing for promotion you just stated positively you had at the Dan River Station? A. I didn't state that, I stated that the tests were used to provide an employee who did not have a high school education with a means of qualifying as having a knowledge or intelligence, etc. in lieu of a high school education; it was a means of unbottling him rather than throwing any block in his way for promotion.

\* \* \* \* \*

[32] \* \* \*

Q. Now, Mr. Austin, considering the test, itself, for promotion of one that is used for considering, for allowing one to be considered for promotion, what test do you use?

A. For promotion at Dan River from the labor group, we would require, if we are going the test route, the taking of the Wonderlic Test and the Mechanical Comprehension AA, which is the Psychological Corporation of New York Test.

Q. Now are these same tests required of applicants for employment? A. Yes sir, in levels above the labor grade, if you are still talking about Dan River, of course.

Q. Yes. A. Yes sir.

Q. Now who chose the particular tests that you are now using in the promotion? A. Well if you mean qualification for consideration for promotion, the test program was prepared under my supervision with such help as we had available and brought in to work with us on it.

Q. Well how did you proceed to select the two tests that you stated are used in considering or allowing one to be considered for promotion? [33] A. Well there are several things that influence us, one is that the Wonderlic Test



*Plaintiff's Exhibit 14*

which is a simple twelve minute test, is widely used and is highly recommended by employers, we have had extensive experience with it. The Mechanical Comprehension Test is one of several of that type that are available and was selected because it appeared to best suit our needs.

Q. Now do you know what the Wonderlic Test is designed to elicit from the person being tested? A. Now I'm not going to pose as an expert on testing and I would want to say that the selection of these tests was done with the concurrence and approval of a trained psychologist, who can indicate much better than I can what the tests are supposed to show, and what they actually do and I would not want to pose as an expert on testing, because I'm not.

Q. Would you give us the name of this expert? A. Dr. G. J. Moffie.

Q. Would you give us his address? A. He is on the faculty of the Graduate School, University of North Carolina, at Chapel Hill.

Q. Did you use anyone else in the process of selecting the tests? A. We discussed our situation with the Psychological Corporation people in New York.

[34] Q. Would you give us the correct name of those or that corporation? A. The only person that I dealt directly with and this was over the telephone, in the early stages, was a Dr. Ricks I did not have his initials, and I do not think that his participation was more than in the early stages of the consideration of the test procedure.

Q. Well did you use anyone else at this Psychological Testing Service? A. No sir.

Q. At any stage in the adoption of the tests? A. No sir, except they are the source of the tests, except for the Wonderlic.

Q. Now who did you use in the selection of the Wonder-

*Plaintiff's Exhibit 14*

lic Test? A. Dr. Moffie and the experience of other companies.

Q. That is the professor at the University, Dr. Moffie?  
A. Right.

Q. Now who did you talk to in reference to the experience of other companies? A. You mean specifically, what other companies?

Q. The individuals at the other companies. A. I cannot name any individuals because the material that is furnished with the tests, the manuals and all, report other companies experiences as they set them out to establish norms, etc.

[35] Q. Now did you use the information that's given with the Wonderlic Test as the experiences of other companies or did you make any independent inquiries yourself? A. We were primarily acting upon the information from the Wonderlic people, if we want to talk about that, which showed that the vast percentage of the testing that had been done for validating purposes would indicate that a level of about twenty-two points raw score was the accepted cut-off for the test.

Q. I'm talking about . . . A. Excuse me, let me finish my answer because I believe you asked me if I talked to other people about it, and I'm trying to explain it.

Q. If you talked to someone else, you could answer that yes or no, and then explain it. A. We talked primarily to Dr. Moffie with respect to adoption of the tests, etc.

Q. Both tests? A. Yes, that is correct, now then I will complete my explanation.

Q. You can complete it. A. While the information furnished by the Wonderlic Company would indicate a cut-off score of about twenty-two, we adopted, on the advice of Dr. Moffie, a cut-off score of twenty so as to make some



*Plaintiff's Exhibit 14*

adjustment for the geographical [36] area in which we operate.

Q. Now did you have a cut-off score for the Mechanical AA? A. Yes sir.

Q. What is that score? A. Thirty-nine, check me on that, George, is it thirty-nine?

Mr. Ferguson: It is in our answers to interrogatories.

Note: Discussion off the record at this time.

A. Thirty-nine, yes sir.

Q. Now therefore in the adoption of these two tests, your primary source of reference would be Dr. Moffie? A. And the validating that had been done by the preparers of the course, itself, that is correct.

Q. Now that validating you say that was done by the preparers of the test, was information that you received from the persons making the test? A. That is correct.

Q. And you did not talk to anyone individually who made the test? A. I did not, no sir.

Q. And do you know whether or not Dr. Moffie did? A. I can't answer for Dr. Moffie's experiences.

Q. Now do you know whether the persons making the Wonderlic Test considered the area in which the test was going to be administered? A. I cannot answer that.

[37] Q. Do you know whether the persons making the Wonderlic Test considered the type of employee or functions that the employee was to perform? A. From the material furnished, I would say that they considered a wide variety of positions and jobs at varying levels to reach the norm of twenty-two that I have mentioned.

Q. Did they consider the specific job functions at the Dan River Station? A. No sir.

*Plaintiff's Exhibit 14*

Q. Did the makers of the Mechanical AA consider the specific job functions at the Dan River Station?

Mr. Ferguson: I don't see how Mr. Austin is qualified to answer what somebody else considered in making a test.

Mr. Chambers: He can say he knows or doesn't know.

Mr. Ferguson: I think it is wasting time, that is certainly not competent what he thinks.

A. I'm interpreting his question to mean did they study the jobs at Dan River and my answer to that is no, the Psychological Corporation, now what they considered as I have indicated in my earlier answer, I don't know, it looked like a wide variety of jobs, that is the best I can do for you.

Q. But you don't recall or know exactly what they considered? A. No sir.

Q. Now did Dr. Moffie make any personal visit to the Dan [38] River Station? A. No sir.

Q. Now in his consideration and recommendation for the test, was he considering system-wide or at the Dan River Station? A. System-wide.

Q. Now you say that these tests are also used for persons making applications for employment? A. I have said that is the primary use of them.

Q. Now you also use the Revised Beta Test? A. Yes sir.

Q. For what purpose? A. For persons that are entering the labor classes only.

Q. Now do you know what information the Revised Beta is to elicit? A. Only what I have been told, that it's a

*Plaintiff's Exhibit 14*

general intelligence test or can be construed as such in a very simple form, it doesn't require a person to be able to read or write to take the test.

Q. Now who did you talk to in selecting the Revised Beta Test for the laborers? A. Dr. Moffie primarily.

Q. Then Dr. Moffie worked with you on each of the tests that you now give? A. Yes sir.

Q. Do you know whether this Revised Beta was adopted only [39] for the Dan River Station or was it system-wide? A. System-wide and I better state one exception, with the exception of the Construction Department.

Q. Do you use a different test for the Construction Department? A. We do not use a test for the labor grades of construction.

Q. The questions I raise then in reference to the Wonderlic and Mechanical A.A., in terms of the selection of that test, your answers would be the same with reference to the Revised Beta Test also? A. The questions with respect to how they were adopted, yes.

Q. Now you were talking about someone validating the Wonderlic Test, do you know whether the Wonderlic Test has been validated for the Dan River Station? A. The Wonderlic Test has not been validated specifically for the Dan River Station. We are in process, under the direction of Dr. Moffie, of attempting validation for the Duke system, but we are in the very early stages of it with no conclusive results.

Q. Do you know whether the Mechanical A.A. has been validated for the Dan River Station? A. For Dan River, specifically, no sir.

Q. Has it been validated for the system? A. No sir, we are in the process.

*Plaintiff's Exhibit 14*

Q. Do you know whether the Revised Beta has been validated for the Dan River Station? [40] A. No sir.

Q. Has it been validated for the system? A. In the process of validation.

Q. Now with respect to those employees who have not completed high school, and who have not taken the test, have you been able to determine whether you get better performance out of those who have completed high school or who have completed the test? A. I believe the question of individual performance would have to be produced from the plant people who are familiar with that.

Q. And you have no way of determining yourself, whether the Wonderlic Test or the Revised Beta or the Mechanical A.A. are appropriate sources for determining the suitability of persons for employment at the Dan River Station? A. In my opinion they are a very appropriate source for determining it.

Q. And that opinion you say is based on the information you have already given here? A. Plus the experience that is being reported to me but you have asked me specifically about the performance of individual employees and I can't answer that.

Q. Do you have any independent information, yourself, of whether these tests actually determine the qualifications of persons for positions with the company? [41] A. If we go back to Dan River, I don't believe a person has taken the test that has subsequently passed it and has subsequently been evaluated and so, of course, I could not possibly have any comparison between the before and afters.

Q. Nor would you have any information to determine whether the persons employed with the company prior to September 1, 1965, would not equally be capable for the

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positions now requiring a test? A. I will ask you to read that one back, that is a long one.

Note: Question read back by reporter.

A. I think the judgment of whether they are capable or not would be made at the plant level.

. . . . .

**Plaintiff's Exhibit 15**

**[20] \* \* \***

Q. Was there ever a policy in practice at Dan River Steam Station to limit Negro employees to certain job categories at the Steam Station?

Mr. Ferguson: Object to that; I think you're going to have to define it as to what—

*By Mr. Belton:*

Q. Prior to January 1, 1964.

Mr. Ferguson: Object to that, and direct the witness not to answer.

(Discussion off the record.)

*By Mr. Belton:*

Q. Was there a policy in practice at Dan River Steam Station limiting employees— Strike that.

Was there a policy at Dan River to limit Negro employees to certain job categories on July 2, 1965? A. No.

Q. Might I ask you to explain, Mr. Thies, why only Negroes were in the category of laborer or semi-laborer as of July 2, 1965? A. I can only give you my opinion. The individuals in these laborer classifications applied for labor jobs at our station, and that's the reason they were in those jobs.

Q. Is it a policy then to employ persons at Dan River only in those categories for which they apply? **[21]** A. No.

Q. Is it a policy of the company to promote individuals from one category to another only in those instances where the employees request the promotions? A. No.

*Plaintiff's Exhibit 15*

Q. There will be some circumstances in which the company would ask the employee if he would be interested in being promoted from one job to another? A. Yes.

Q. Do you have any knowledge, Mr. Thies, of the requests of any of the named plaintiffs for promotion to jobs other than the category of semi-skilled laborer since July 2, 1965? A. Yes.

Q. Have there been any vacancies at Dan River in terms of promotion since July 2, 1965? A. Yes.

Q. Are there presently vacancies? A. No.

Q. Since July 2nd? A. Not to my personal knowledge.

Q. Have there been any new employees hired at Dan River since July 2, 1965? A. No.

Q. Have there been any promotions at Dan River since July 2, 1965? [22] A. Yes.

Q. And vacancies have been created? A. Yes.

Q. Those vacancies have not been filled— Let me rephrase the question: Have those vacancies been filled? A. Yes.

Q. In the filling of vacancies as they occur, is it the policy of the company to fill the vacancy that was created by the movement from one job to the next? A. If it leaves a vacancy, yes.

Q. And you say that there have been promotions since July 2, 1965? A. Yes.

Q. Have vacancies been created? A. In some cases, yes; in some cases, no.

Q. Would it be possible or are there any records at Dan River that would indicate those categories of jobs for which vacancies came about subsequent to July 2, 1965, that have not been filled? A. I know of no job that has not been filled.

Q. But there have been promotions? A. Yes.

*Plaintiff's Exhibit 15*

Q. As the result of these promotions, there were vacancies in the positions from which the persons were promoted? A. In some cases, yes; in some cases, no.

\* \* \* \* \*

[31] \* \* \*

Q. Did you take any steps in reference to the testing matter that was brought up at the meeting of March 2nd? A. Yes, sir.

Q. May I ask you what those steps were? A. On a visit to Dan River Station, about the latter third of the month, I was in the coal-handling area and talked with several of the labor employees at that time on an informal basis. And they expressed to me their suspicion of these tests and their concern about the tests, and I attempted to explain to them at that time that the tests were offered to them to include them, rather than exclude them from any opportunity, that anyone who had a high school education met [32] one of the qualifications for consideration for promotion; and that if they did not have a high school education, they could go to an institute in the community and on their own time obtain this high school diploma, and that would meet the high school requirement. And the company would consider this as job-related training and we would pay for this, if they satisfactorily completed the course, under our tuition refund program on the same basis that we do any of the courses that qualify under our tuition refund program, which I believe we pay three-fourths of the cost. And I also told them that if some of them wanted to they could take these two tests that are given to all new employees as a condition of employment, along with having a high school education; they could take these two tests and I would consider that to be in lieu of the high school education requirement, if they made a



*Plaintiff's Exhibit 15*

passing grade. This I attempted to explain to them at that time. I'm not sure that they all understood it, based on subsequent questions that we had about it.

. . . . .

**[38]** . . .

Q. What are the qualifications for the job of labor foreman? A. The labor foreman must be able to supervise people, to direct the work of others in a satisfactory manner, to understand the tasks that need to be done, to coordinate his work with the various departments within the power station, to keep the necessary records, and to schedule his employees for the various vacations and holidays; generally the same qualifications that any supervisor must have, good communication with his men, leadership, and understanding of his job.

Q. Would it be necessary for the labor foreman to work in the categories of laborer or semi-skilled laborer? A. Not necessarily.

Q. Would it be a requirement for the promotion to the job of control operator that the employee have worked in the category of pump operator? A. Yes.

**[39]** Q. Would it be a requirement for a promotion to the job position of coal equipment operator to have worked in the job category of coal-handling operator? A. Yes.

Q. Would it be necessary for a transfer from coal-handling to the power station that the employee begin as a learner? For example, to explain the question, if I may, if a person wanted to transfer from coal-handling to the power station and he was in the job category of coal-handling operator, would it be necessary, for instance, to go into the power station in the job category of a learner? A. No.

Q. In what jobs in the power station would he go into,

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after having worked in coal-handling? Could he go into— Let me rephrase the question: Could an employee from coal-handling move into the position, if the vacancy occurred, as pump operator in the power station? A. No.

Q. What would be the first job that he would be required to do on transfer to the power station? A. I cannot answer that question specifically, because where he would be put to start with in the power station, if he qualified for this promotion by having a high school education in the first place, would depend on his own knowledge and abilities of the power station that he had gained by [40] whatever means. One man might have studied on his own and come over on his off time and observed the operations of the station and be really very well qualified to go into the utility operator classification. Another man might not. The same would go for the maintenance.

Q. But it would be possible under certain circumstances for a person or the coal handler to go directly to the position of control operator in the power station? A. No.

Q. He would have to go through the pump operator's position first? A. No. The utility operator would be the highest classification that he would be considered for, in my opinion, not knowing the man that we're talking about.

Q. I realize that we're not talking about a specific man, but I'm trying to find out the policy as relates to transfer to various departments of the company. A. Normally, he would start in the operating department in the utility operator classification or lower.

. . . . .

[42] . . .

Returning to the consideration of overtime work, did you state that under some circumstances an employee, in

*Plaintiff's Exhibit 15*

working overtime, would not be working in the job category that he normally works in? A. That is possible, yes.

Q. Would it be— Would a laborer ever work any classification other than the category of laborer during scheduled overtime? A. No. Our policy is not to work an employee above his classification. We do, on occasions, work an employee in a lower classification than he is being paid for in time of need.

Q. Would an employee who is working in a lower classification than his usual classification receive the same rate of pay as he received in his regular job? A. Yes, he would.

Q. Do you know whether employees in classifications other than that of laborer or semi-laborer have worked during the scheduled overtime period in jobs that are laborers jobs? A. I'm sure that they must have, but my personal knowledge does not permit enough information to answer your question; Mr. Knight would be in a better position to answer this.

Q. Would this mean that if an employee did work in a category—a higher graded employee worked in a category or a [43] job that is considered as a laborer's job, he would be receiving that rate of pay for his normal job? A. He is considered as though he is working in his regular classification; and if the work that he is doing happens to be the same type of work that a laborer does regularly, such as lifting something or carrying something, then he is still paid at his regular rate for whatever job he is performing.

. . . . .

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[25] . . .

Q. Based on your familiarity with the personnel records of employees, would you say or would you be of the opinion that there are presently employed persons in the category of labor who could perform some of the jobs of the coal-handling department? A. We have one who is in the coal-handling department now, and he is doing a very good job.

Q. I think that one is Jesse Martin, is it not? A. Yes.

Q. Are there others than Mr. Martin who, in your opinion, could be trained for— A. Possibly so. We would have to determine that by action or actually putting them in, if there was an opening, and see how they would perform.

Q. And how would you make this determination, by placing them in a job category? A. You would take the next senior man, if he was qualified to go on the job, and make a trial of him and try him out.

. . . . .

**Plaintiff's Exhibit 30**

**[22] • • •**

Q. State whether or not since July 2, 1965, there have been any vacancies for which you could recommend a semi-skilled laborer to be transferred or—and in that way, a promotion—or to be considered eligible for promotion to another department in the plant. A. No, sir.

## Plaintiff's Exhibit 31

DAH RIVER & AN STATION EMPLOYEES - FRIDAY IL 29, 1966

	<u>NAME</u>	<u>EDUCATION</u>	<u>SPECIAL TRAINING</u>
01 001	James L. Williams	6th Grade	
01 002	John C. White	High School	
01 003	Thomas E. Black	2 Yrs. College	Teletype School
01 004	Harry J. Stewart	7th Grade	
01 005	Eddie Galloway	4th Grade	
01 006	Ralph Lay	High School	Radio & Telephone Oper. School
01 007	Clarence M. Jackson	7th Grade	
01 008	Hallory Roach	High School	
01 009	Herman E. Martin	High School	Business & Farm Shop Course
01 010	Thomas T. Pratt	10th Grade	
01 011	H. R. Hawkins	High School	Electronic & Radio Oper. School
01 013	W. F. Sifford	8th Grade	
01 014	W. S. Griggs	10th Grade	
01 015	W. R. Robinson	9th Grade	Mech. & Auto Parts Dept. School
01 017	Mrs. Virginia Ritchie	High School	
01 016	C. W. Joyce	High School	1 Yr. College - 1 Yr. Accounting
01 019	Eddie Broadnax	4th Grade	
01 020	W. L. Smith	High School	
01 021	S. R. Via	High School	
01 022	H. C. Siegner	High School	2 Yrs. Mechanic School
01 023	Koraco Myers	Grade School	Blue Print Reading
01 026	D. E. Soyars	High School	
01 027	L. W. Bragdon	8th Grade	
01 028	R. F. Vernon	6th Grade	
01 029	Willie Boyd	3 Yrs. High School	
01 030	Thomas E. Woods	10th Grade	
01 031	William Purcell	Grade School	
01 032	Sam McPeak	9th Grade	
01 033	Jesse C. Martin	High School	
01 034	Ernest L. Franklin	6th Grade	
01 035	Otis R. Shelton	2 Yrs. High School	
01 036	David Hatchett	6th Grade	Auto Mechanic
01 037	W. L. Page	9th Grade	Fundamental Electric Course
01 038	W. J. Joyce	Grade School	
01 039	James E. Robertson	College Graduate	
01 043	Herman R. Self	2 Yrs. College	
01 044	C. B. Bridges	7th Grade	
01 045	Robert L. Mitchell	6th Grade	
01 046	F. E. Thomason	High School	Machinist & Electrical School
01 047	Charlie B. Kallan	High School	Water Works School
01 048	J. B. Dyer Jr.	2 Yrs. College	Dale Carnegie Course
01 049	Curtis L. Walsh	High School	
01 050	Henry G. Strong	9th Grade	2 Yrs. Agriculture
01 051	Frank L. McBride	10th Grade	
01 052	Ralph S. Martin	10th Grade	Water Tenders School
01 053	William G. Demina	8th Grade	
01 054	C. E. Purcell	10th Grade	
01 055	L. L. Johnston Jr.	High School	
01 056	J. R. Farris	High School	
01 057	James E. Fulcher	High School	
01 058	Joseph G. Neal	High School	2 Yrs. Hospital Corps School
01 060	Jack D. O'Dell	5th Grade	
	Louis H. Hairston Jr.	3 Yrs. High School	Auto Body Works School

	<u>NAME</u>	<u>EDUCATION</u>	<u>SPECIAL TRAINING</u>
056	Clarence Ameriello	High School	
057	G. C. McClung	High School	8 Wks. Gen. Electricians Course
058	R. W. Morris	High School	
059	Robert L. Martin Jr.	1 Yr. High School	
070	C. H. Parker	8th Grade	Blue Print Reading
071	C. R. Rollins	8th Grade	
072	R. W. Hutchins	High School	Cost Accounting
073	J. G. Joyce	11th Grade	
074	V. A. White	College Graduate	
075	T. M. Hudson Jr.	High School	Blue Print Reading - Welding Radio School
076	J. E. Joyce	High School	
077	Carlton Cox	10th Grade	Electrical School & 4 Navy Electrical Courses
078	- R. A. Jumper	High School	
079	- Junior Blackstock	7th Grade	
080	R. E. Greene	High School	Water Works School
081	Alfred Vernon	6th Grade	
082	J. Hener King	High School	
083	W. S. Spangler	4th Grade	
084	T. I. Gillio	High School	
085	W. L. Clark	High School	Fire Fighting & Diesel School
086	J. M. Soyars	High School	
087	H. B. Kallan	High School	Signal Corps School
088	Jady L. Martin	7th Grade	
091	J. E. Ferguson	High School	
092	W. T. Edwards	High School	
093	M. G. Rawlins Jr.	High School	
503	C. C. Pendergrass (retired)	High School	
	J. T. DePriest	11th Grade	
513	H. K. Tyler	College Graduate	
505	O. A. Cates	High School	
516	J. C. Allred	High School	Electric Wiring & Auto Mech. School
515	C. D. Rhyno	High School	Electronics Course - N.R.I.
507	J. Dan Rhyno	3 Yrs. College	
514	R. K. Lemons	College Graduate	B.S.M.E.
506	J. T. Wilson	High School	Hays Combustion - Correspondence
508	H. T. Harrison	2 Yrs. College	
511	Jasper Smith	High School	
510	J. M. Ritchie	High School	
512	W. G. Rudd	College Graduate	
504	L. G. White	2 Yrs. College	Electronics Course
19	J. D. Knight	College Graduate	B.S.E.E.

## Plaintiff's Exhibit 32

• • •  
[16]

Q. Well, even if there are no openings at the present time [17] you understand, do you not, that if you take the test and pass it you can be considered when a vacancy does occur? Do you understand that? A. Yeah, I understand that.

• • • • •

[12] • • • *Redirect Examination by Mr. Ward:*

Q. To your knowledge, have any vacancies occurred in these higher paying jobs since July 1, 1965? A. No, not to my knowledge.

• • • • •

[10] • • •

Q. You knew that without the high school education you could take the test that Mr. Knight referred to, and if you passed you would be eligible for promotion? A. That's what he said.

• • • • •

[6] • • •

*By Mr. Ferguson:*

Q. Now you have been told by Mr. Knight, have you not, that when and if another vacancy exists in coal handling that you will be considered for that vacancy? I don't mean by that, he hasn't promised you anything; I understand that. But he has told you, has he not, that when another vacancy exists in coal handling that you will be considered for that vacancy? A. I presume so. They just told me if anything come up I'd be next.

Q. You don't have to take the test; that's what I'm driving at. You know that, don't you? A. That's right.

• • • • •



11 33  
129b

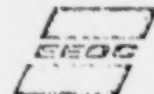
Plaintiff's Exhibit 33

GUIDELINES  
ON  
EMPLOYMENT  
TESTING  
PROCEDURES



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

August 24, 1966



## GUIDELINES:

Title VII of the Civil Rights Act of 1964 provides that an employer may give and act upon the results of "any professionally developed ability test provided that such test . . . is not designed, intended or used to discriminate because of race . . ." (Sec. 703 (h)). The language of the statute and its legislative history make it clear that tests may not be used as a device to exclude prospective employees on the basis of race. The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

Evaluation of test results is but one of several methods available to an employer in screening applicants and selecting new employees. If the facts indicate that an employer has discriminated in the past on the basis of race, sex or other prohibited grounds, the use of tests in such circumstances will be scrutinized carefully by the Commission.

An employer committed to equal employment opportunity will take affirmative action to ensure that all of his personnel policies are valid and consistent with his commitment.

Employers have discovered that they may be inadvertently excluding qualified minority applicants through inappropriate testing procedures. Indeed such testing may discriminate in employment and promotion just as effectively as the once common "white only" or "Anglo only" signs. On the other hand, employers who use tests, but treat them as only one of several factors in the hire or promotion process, have found valuable employees in minority groups who would have been excluded if the tests were the sole and controlling factor.

Employers have appealed to the Commission for guidance in the search for sound testing procedures. The Commission, on its part, has consulted with a panel of outstanding psychologists, all of whom have broad practical experience in the testing field. The guidelines are based on their recommendations.

Following are the general guidelines of the Commission and the report of the psychologists. In developing the guidelines the Commission sought to provide employers with a scientifically sound, industrially-proven, and equitable basis for matching manpower re-

quirements with human aptitudes and abilities. The employer who conscientiously follows these guidelines will have taken a long step to ensure equal opportunity to all applicants and employees regardless of race, color, religion, sex or national origin.

### THE COMMISSION ADVOCATES:

1. Use of a total personnel assessment system that is non-discriminatory within the spirit of the law and places special emphasis on:

a) **Careful job analysis to define skill requirements.** Job descriptions should be examined and the essential requirements of the job determined before tests are selected. Job requirements often are stated in generalized terms such as "high school graduate," or "potential to advance to higher level." Such requirements may not necessarily be related to performance of a specific job in a given work setting.

b) **Special efforts in recruiting minorities.** The Commission encourages employers to seek out minority group applicants, to objectively assess their potentialities as employees, and to hire "qualifiable" applicants.

c) **Screening and interviewing related to job requirements.** Screening of applicants should be based on the qualifications required for a specific job. Interviewing and testing of minority applicants should be conducted by personnel thoroughly committed to equal employment opportunity policy as well as knowledgeable and skilled in intergroup relations. An inferior education and lack of opportunities for development of skills may cause minority group applicants to appear less confident or less knowledgeable to the uninitiated, but such persons may be fully productive workers in many jobs.

d) **Tests selected on the basis of specific job-related criteria.** The Commission views tests as only one component of the personnel system — no better or worse than the selection system of which they are a part. "It is quite possible to take a test that has been professionally developed in one situation and misuse it in another situation." The characteristics of a test, apart from the situation in which it is used, are not sufficient evidence on which to judge its quality.

The Commission will not recommend any particular test, but adopts the *Standards for Educational and Psychological Tests and Manuals*, prepared by a joint committee of the American Psychological Association, American Educational Research Association, and National Council on Measurement in Education

(published by The American Psychological Association). This publication, endorsed by the panel of psychologists, consulted by the Commission, was prepared by recognized spokesmen for the profession and establishes standards and technical merits of evaluation procedures.

e) **Comparison of test performance versus job performance.** The Commission encourages the use of job-related ability tests. Employers must be aware that when an applicant has not enjoyed equal educational and developmental opportunities, his score on a test may underestimate his job potential. The ultimate standard, however, is not the test score but performance on the job. Since cultural factors can so readily affect performance on so many tests, it is recommended that the test be judged against job performance rather than by what they claim to measure.

f) **Retesting.** Mindful of the special problems of minorities, employers are encouraged to provide an opportunity for retesting to those "failure candidates" who have availed themselves of more training or experience. A recent conciliation agreement signed by the Equal Employment Opportunity Commission and a State Employment Security Commission requests the ESC personnel assigned to local offices "to exercise a more liberal construction" of the agency's manual concerning testing. In particular, if an applicant during the course of an interview claims he has had more education or experience, then that person will be retested. It further provides that the State Bureau of Employment Security be requested to examine the feasibility of issuing less subjective regulations pertaining to retesting, so as to ensure every applicant maximum opportunity to qualify for job openings.

g) **Tests should be validated for minorities.** The sample population (norms) used in validating the tests should include representative members of the minority groups to which the tests will be applied. Only a test which has been validated for minorities can be assumed to be free of inadvertent bias. The Commission encourages employers to check these tests to make sure that hidden discrimination against minorities is not present.

II. **Objective Administration of Tests.** Since tests are assessment tools and their value depends upon the skill of their user, it is essential that tests be administered by personnel who are skilled not only in technical details, but also in establishing proper conditions for test taking. Members of disadvantaged groups tend to be particularly sensitive in test situations and those giving tests should be aware of this and be able to alleviate a certain amount of anxiety.

## REPORT BY PANEL OF PSYCHOLOGISTS

The Equal Employment Opportunity Commission has asked us to advise it with respect to several issues concerning the development, introduction and administration of tests of aptitude and/or ability in industrial settings as related to problems of race relations. More particularly, the Commission has inquired concerning the processes by which tests should be developed and administered in an employment setting.

### OBJECTIVE PERSONNEL ASSESSMENT SYSTEM

We recommend that the Commission advocate the use of a *total personnel assessment system* toward the attainment of equal employment opportunities for all Americans. The many components of an objective personnel assessment system, i.e., job analysis, development of criterion-related validity, psychological testing, recruitment, screening of applicants, interviewing, and the integration of pertinent personnel data, provide the employer with the basis for matching manpower requirements with human aptitudes and abilities that is most likely to be non-discriminatory within the spirit of the law.

The mutual interdependence of the respective components is definitive relative to the fairness and effectiveness of all aspects of the system. A sound testing program, for example, would be degraded by failure to admit appropriate applicants or by failure to use qualified personnel for the interpretation of test scores and additional relevant data obtained from other components of the assessment system. The final measure of the quality of fairness of a testing program must, therefore, hinge on the functional adequacy of the total personnel assessment system rather than any narrow evaluation of the quality of an individual system component.

### PROFESSIONALLY DEVELOPED TESTS

We further recommend that the Commission adopt policies encouraging the development and application of various personnel selection and assessment procedures, and that guidelines, standards, and technical attributes of these evaluation procedures be stated in terms of principles and of sound objective assessment practices. To this end, the Commission may wish to consider the adoption of the published *Standards for Educational and Psychological Tests and Manuals*, issued jointly by the American Psychological Association, the American Educational Research Association, and The National Council on Measurement in Education (1966). It is of utmost importance that the

guidelines and operational policies encourage and facilitate use of objective and equitable personnel assessment systems.

### PROFESSIONAL APPLICATION OF TESTS

Section 703(h) of Title VII of the Civil Rights Act of 1964 provides for the use of "professionally developed ability test(s)". It is also important to provide for the professional application of tests. It is quite possible to take a test that has been professionally developed in one situation and misuse it in another situation. Thus, the characteristics of a test, apart from the situation in which it is used, are not sufficient evidence on which to judge its "professional nature".

What then is the heart of this "professional nature"? It involves a process from the determination of behavioral requirements of the job through careful job analysis, the selection and/or development of instruments to measure these critically important abilities, the administration of these instruments to applicants for the job or employees on the job, the identification or development of measures of effective job performance (the criteria), to the comparison of individual employee scores with their criterion performance.

### JOB ANALYSIS

Job analysis provides the systematic, precise identification of the skill requirements of the different categories of jobs. It is the matrix within which employee capabilities may be specified. The assessment system in industry is the procedure which matches skill requirements, determined through job analysis, with employee capabilities.

### CRITERION-RELATED VALIDITY

While the earlier steps described above for a professional approach to testing are important, the crucial step is the final process of comparing test performance with job performance. Tests should be selected on the basis of validation against the performance requirements of the job, that is, criterion-related validity. In this sense a single test has a different degree of validity for each job-situation for which it may be used. In fact, a test may have varying validities for different aspects of the same job. It may accurately predict certain phases of job performance (e.g. number of accidents), but may fail to predict quality of output. If the scores from a given test, however, correlate (more than chance would indicate) with any important aspect of the job, the test may be said to have validity for that job. In this same sense several tests or a test battery may be required to predict the several required aspects of job performance.

For many jobs, schools or training courses have been established to

prepare the employee to perform the work. Test scores are often related to performance in the school (e.g. grades). It has frequently been found, however, that these course grades are not highly related to measures of job performance. Hence, it is recommended that wherever possible reliable measures of job performance should be used as criteria rather than the measures obtained during training. It should also be recognized that through time, jobs and job conditions frequently change. In these cases it will be necessary to revalidate the test. Maintaining current evidence of validity thus becomes a phase of the professional process.

In such validation the norm population must be relevant. It should be described in terms of those variables known to be relevant to the ability tested. The occupation and experience of workers in the norm population should be described. The decision to use the test should be based on data from a clearly adequate sample.

### NORMS

When a person takes a test, many things may influence his score, quite apart from the aptitude or ability being measured. For example, language deficit can affect a score on an arithmetic reasoning test; as can other early learning experiences such as putting odd shaped blocks together. The extent to which any cultural factor operates independently of the trait being measured can affect test reliability and validity for that segment of the population whose culture differs appreciably from the normative groups. For such a person who is so affected, the test may underestimate his true potential and deprive the employer of a capable and willing worker.

Because of the possible adverse effects of culture on test scores, it is important that the population used in establishing norms be clearly described. Since, in practice, it is difficult to develop norms for each of the many homogeneous subdivisions (i.e. minority groups, etc.), the resulting problems of test interpretation demand a thorough appreciation of the factors involved on the part of the interpreter. The test user should, therefore, select instruments, when possible, which minimize cultural differences. Provisions also should be made for retesting when there is evidence that the applicant has availed himself of experience, i.e., formal training, etc., which would further reduce cultural handicaps. Any dynamic view of assessment must take into account not only the current status of the individual but also the rate at which he is progressing in the further development of those traits being measured.

Within this context, and where there is a strong indication that a cultural deficit is seriously affecting test reliability and validity, other methods of assessment such as job performance should be used. It



would seem desirable, however, that the Commission encourage, that as rapidly as possible, validation studies be conducted with minority groups using measures of cultural background as moderator variables.

#### TRAINING OF PROFESSIONALS FOR SELECTION, ADMINISTRATION AND INTERPRETATIONS OF TESTS

Recognizing the benefits inherent in objective evaluation when properly developed, selected, administered, and interpreted, it then becomes necessary to consider the appropriate professional level required to perform each of those various functions. The matter of "professional development" of assessment instruments has been treated above, leaving open the questions of administration and interpretation of tests.

It would be impractical to outline a specific course of training which would qualify one to administer, score and interpret tests. Different tests demand different levels of competence for administration, scoring and interpretation. It is, therefore, the responsibility of the professional to recognize the limits of his competence and to perform only those functions which fall within his preparation and competence.

In the final analysis, tests are merely tools, and their value depends upon the skill of their user. Of central importance is the commitment of the employer to institute within his organization a total objective personnel assessment system fairly administered and professionally implemented so as to provide equal employment opportunities for all Americans.

Submitted May 17, 1966

DR. BRENT BAXTER, Vice President and Director of Research, American Institutes For Research.

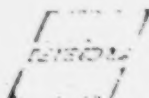
DR. RICHARD F. DOCTER, Associate Administrative Officer, State and Professional Affairs, The American Psychological Association.

DR. GEORGE S. ELIAS, Associate Professor of Psychology and Education, Assumption College.

SHERMAN FEIN, Esquire, Fein, Cavanaugh, and Kimball.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1800 G STREET, NORTHWEST  
WASHINGTON, D. C. 20506





Defendant's Exhibit 1  
DUKE POWER COMPANY

GENERAL OFFICES  
422 SOUTH CHURCH STREET  
CHARLOTTE, N. C. 28201

TELEPHONE: AREA 704  
332-8521

P. O. BOX 2178

September 22, 1965

Mr. R. W. Bostian, Supt.  
Mr. R. A. Cox, Supt.,  
Mr. A. E. Deck, Supt.  
Mr. J. D. Knight, Supt.  
Mr. F. L. Smith, Supt.  
Mr. E. L. Thomas, Supt.  
Mr. H. B. Tucker, Supt.  
Mr. J. L. Vaughn, Supt.

Subject: Personnel  
Promotion Policy

Dear Sir:

This will confirm our new policy announced at the Superintendents' meeting September 10, 1965 concerning promotion of non-high school graduates from Coal Handling, Watchman, or Laborer, to an Operating, Maintenance, or other classification in the station organization.

A man in one of these classifications who was on your payroll prior to September 1, 1965 may be given a series of tests to determine his eligibility for consideration for future promotion. If he makes the minimum acceptable grade on all tests, he will then be considered just as though he did have a high school diploma.

The tests are:

"Test of Mechanical Comprehension Form AA" - Minimum acceptable score - 39.

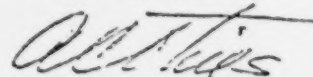
"Wonderlic Personnel Test - Form I" - Minimum acceptable score - 20. (21)

The tests may be offered more than once, however, there must be at least a six month interval between tests taken by the same person.

This minimum score for eligibility for promotion will prevail until you are advised otherwise.

If there are any questions, please advise.

Very truly yours,



A. C. Thies  
Manager, Steam Production

## Defendant's Exhibit 3

## 19. UTILITIES &amp; COMMUNICATIONS\*

## Minimum Occupational Scores

Number of Questions Answered Correctly in 12 Minutes  
Reported by One or More Companies  
Participating in the Study

NUMBER OF COMPANIES REPORTING 36

	Central Tendency
<b>PROFESSIONAL &amp; EXECUTIVE</b>	
Communications Consultant .....	30
Programmer .....	29
Administrative Trainee .....	29
Lawyer .....	29
Engineer .....	29
Engineer, Electrical .....	29
Geologist .....	28
Public Information Writer .....	28

<b>OFFICE, PLANT &amp; SALES MANAGEMENT</b>	
Equipment Coordinator .....	30
Personnel Assistant .....	29
Foreman, Central Office .....	29
Accountant .....	28
Cadet Engineer .....	28
Foreman, Plant .....	27
Foreman, Maintenance .....	27
Copywriter .....	26
Office Manager .....	26
Engineer Assistant .....	23
Draftsman .....	21

<b>OFFICE STAFF, INCLUDING CLERICAL</b>	
Accountant, Junior .....	25
IBM Machine Operator, Senior .....	25
Secretary .....	24
IBM Machine Operator, Junior .....	23
Stenographer .....	22
Clerk, Accounting .....	22
Clerical, General (Male) .....	22
Machine Operator .....	22
Bookkeeper .....	22
Collector .....	22
Public Interview Representative .....	22
Cashier .....	22
Clerk, Statistical .....	22
Verifier .....	21
Clerk, File & Records .....	21
Typist .....	21
Key Punch Operator .....	21
* Blue Printer .....	20
Clerical, General .....	20
Clerk, Junior .....	20
Clerk, Mail .....	19
Receptionist .....	18

	Central Tendency
<b>SALES FORCE &amp; STAFF</b>	
Home Economist .....	28
Salesman .....	26
Sales Representative .....	26
Salesman, Technical .....	26
Home Service Representative .....	25
Salesman, Appliance .....	21
Sales Representative, Retail .....	21
Clerk, Dealer Promotions .....	21

<b>PLANT STAFF &amp; LINE PERSONNEL</b>	
Gas Engineer .....	23
Specifications Detailer .....	23
Clerk, City Plant .....	23
Timekeeper .....	22
Communications Technician .....	22
Electrician .....	22
Equipment Man (Phone) .....	22
Telephone Operator .....	20
Traffic Operator .....	20
Messenger .....	20
Repairman (Shop) .....	20
Helper & Learner .....	20
Journeyman .....	20
Frameman .....	20
Meter Reader .....	19
Groundman .....	19
Customer Serviceman .....	18
Mechanic .....	18
Stockman .....	18
Pipeman .....	18
Lineman .....	18
Apprentice .....	18
Collector .....	18
Installer .....	17
Charge Engineer .....	17

## OTHER, (DAY LABOR, SPECIAL)

Warehouseman .....	25
Matron .....	20
Substation & Transmission .....	17
Laborer .....	17
Utilityman .....	15
Roustabout .....	15
Janitor .....	15

Defendant's Exhibit 4

TEST OF

MECHANICAL  
COMPREHENSION  
FORM AA

MANUAL

GEORGE K. BENNETT

*Published by*  
THE PSYCHOLOGICAL CORPORATION  
304 East 45th Street  
New York 17, New York

## INTRODUCTION

The Test of Mechanical Comprehension measures the ability to perceive and understand the relationship of physical forces and mechanical elements in practical situations. This type of aptitude is important for a wide variety of jobs and for engineering and many trade school courses.

Form AA is suitable in difficulty for male applicants for industrial jobs and for high school students. It may also be used with women, particularly when a high level of mechanical understanding is required by the contemplated work or training. Women's scores average about 12 points lower than the scores of similarly situated men. (2)

Mechanical comprehension may be regarded as one aspect of intelligence if intelligence is broadly defined. The person who scores high in this trait tends to learn readily the principles of operation and repair of complex devices. Like other aptitude tests, it is influenced by environmental factors, but

not to an extent that introduces important difficulties in interpretation. Formal training in physics appears to increase the score by not more than 4 points. (See below.) Care has been taken to present items in terms of simple, frequently encountered mechanisms that do not resemble textbook illustrations or require special knowledge.

The practical value of the Test of Mechanical Comprehension is enhanced for many situations by its relatively low correlation with other tests. With intelligence tests, the correlation is usually between .4 and .6; with Revised Minnesota Paper Form Board, within the same range; with the Hand-Tool Dexterity Test, between .3 and .4; with the Minnesota Clerical Test, the correlation is close to zero. These low intercorrelations frequently permit the use of teams or batteries of tests with a combined predictive value appreciably higher than could be obtained by the use of any single test.

## ADMINISTRATION

This test has no time limit. Ordinarily, a great majority complete the test in twenty to twenty-five minutes; little is gained by allowing more than thirty minutes.

After distributing the booklets and answer sheets, say: You have been given a test booklet containing questions and a separate sheet for your answers. Be sure to write on only the answer sheet. Make no marks on the booklet itself.

Now look at the directions printed on the cover of your test booklet while I read them aloud to you.

Fill in the requested information on your ANSWER SHEET. (The examiner may enumerate the following: Print your name, last name first; your age in years and months; put an "M" after sex if you are a man or boy, an "F" if you are a girl or woman. The date is . . . . After the word "group," print the name of your school or the company that you work for. Now draw a circle around the highest grade that you have finished in school. Allow time for the writing of this information.)

Now line up your answer sheet with the test booklet so that the "Page 1" arrow on the booklet meets the "Page 1" arrow on the answer sheet. Demonstrate. Then look at Sample X on this page. It shows pictures of two rooms and asks, "Which room has more of an echo?" Because it has neither rugs nor curtains, there is more of an echo in room "A," so blacken the space under "A" on your answer sheet. Now look at Sample Y and answer it

yourself. Fill in the space under the correct answer on your answer sheet. Are there any questions? If the answers on the answer sheet are not directly opposite the questions, raise your hand.

After Sample Y has been answered, say: On the following pages there are more pictures and questions. Read each question carefully, look at the picture, and fill in the space under the best answer on the answer sheet. Make sure that your marks are heavy and black. Erase completely any answer you wish to change. Be certain that you use the right column on the answer sheet for each page. The arrow on the page should meet the arrow on the answer sheet. These arrows are at a different place on each page to help you.

Now open your booklets and fold back the cover so that only Page 2 shows, like this. Demonstrate. Then slip your answer sheet under the booklet and line it up so that the arrows for "Page 2" meet, like this. Demonstrate. When you finish a page, go right on to the next. Now begin the test. Answer all the questions; you will probably have plenty of time to finish. If you have any questions, raise your hand. The examiner should make sure that everyone understands how to use the answer sheet.

If the answer sheets are to be machine scored, the examiner should include appropriate directions regarding the special pencils.

## SCORING

IBM answer sheets only are available for this test; they may be either hand-scored or machine-scored. If the test is to be machine-scored, only the RIGHTS Key is used; this key is placed in the test scoring machine so that both "rights" and "wrongs" are counted. The controls are adjusted so that the net score equals  $R - \frac{1}{2}W$ . The meter reading so obtained is entered on the answer sheet as Total Score. For hand-scoring, both the RIGHTS Key and the WRONGS Key are used in succession. The number of "right" responses is entered in the appropriate space on the answer

sheet. Using the WRONGS Key, the number of incorrect responses is determined and entered in the appropriate space. The score equals the number of correct items minus one-half the number of wrong items. This difference is entered as Total Score. Omitted items count as neither right nor wrong. Where the number of wrong is an odd number, the fraction is dropped before subtraction, giving the examinee the benefit. (For example, if 43 items are answered correctly, 15 incorrectly, and 2 are omitted, the score is  $43 - 7$  or 36.)

## INTERPRETATION

The score for each person tested should be evaluated in relation to the norms for an appropriate group. Students about to leave high school may be compared with high school seniors, engineering school freshmen, or candidates for technical or apprentice training courses. In practically every instance, other test scores and personal data must be

considered. For almost all technical courses, good mathematical ability is required. For engineering schools the candidate should possess high academic aptitude and superior mathematical knowledge. For trade school and apprentice courses, manual dexterity is important. Business organizations often find their own norms the most valuable.

## CONSTRUCTION OF THE SCALE

The original items were roughly sketched on cards and displayed individually to a number of persons of varying educational levels and mechanical interest. On the basis of the responses of this exploratory group, some items were eliminated and the wording or pictures of others were altered. Seventy-five items were then prepared in their present form and printed in a booklet. This form was administered to several groups to obtain data for item analysis. Due to the difficulty of obtaining actual criteria of subsequent proficiency at mechanical work from an adequate number of cases, a composite of mechanical test scores was used as the criterion. For one group of 283 subjects, applicants

for apprentice-type training, the scores on three other mechanical tests were available. These tests were the MacQuarrie Test for Mechanical Ability, the Detroit Mechanical Aptitudes Examination, and the Revised Minnesota Paper Form Board. A weighted score resulting from the performance of each individual on all four tests was obtained. The responses of the upper and lower 27 per cent of the group as determined from the composite score were subjected to item analysis. Following the Kelley-Wood procedure, the discriminative value of each item was determined. Thirteen items were discarded; the two easiest were used as samples; and the remaining 60 arranged in order of difficulty.

## VALIDITY

As is the case with any test, the validity of the Test of Mechanical Comprehension varies according to the nature and reliability of the criterion.

A great number of validity coefficients have been computed against military criteria. In some instances, the Test of Mechanical Comprehension used was the present form; in others, the test was one patterned after Form AA and constructed either by The Psychological Corporation staff or by psychologists in the armed services. For some military specialties, mechanical comprehension has shown

greater validity than any other type of test item. (1)

For a number of situations where the criterion was the final grade in some technical military course, mechanical comprehension is second by a small margin to the General Classification Test score in validity. It appears that where a job or training course requires the ability to understand the operation of machines, the Test of Mechanical Comprehension is likely to contribute usefully to the prediction of success. If facility in reading or



mathematics is highly important, an intelligence test may have better predictive efficiency. Military proficiency examinations in many mechanical specialties have a heavy loading of questions involving nomenclature and mathematics which are often foreign to the actual job requirements.

A study by Bennett and Fear (3) with 66 machine tool operator trainees tested before training resulted in a correlation of .64 against supervisors' ratings of on-the-job performance several months later. Revised Beta Examination, administered at the same time, predicted these ratings to the extent of .37. The Atlantic Division of Pan American Airways reports for 137 shop trainees a coefficient of .62 between the Test of Mechanical Comprehension score and subsequent shop grades.

E. E. Jacobsen (4) reports a study of several tests with five types of aircraft mechanic learners' courses. Correlations between tests and grades were generally low. In four courses, the coefficients for Form AA ranged between .30 and .41, this test being either first or second among those tried.

J. T. Shuman (6) reports on the effectiveness of the Otis Quick-Scoring Test of Mental Ability, the Revised Minnesota Paper Form Board Test and

the Test of Mechanical Comprehension Form AA in the selection of aircraft factory employees. Tests were compared with job ratings for a total of 363 employees in 6 different job classifications. The mean biserial coefficient was .52 for the Mechanical Comprehension Test, .49 for Otis, and .44 for the Paper Form Board.

Minimum critical scores are reported for men in all 6 categories of employment and for women inspectors and machine operators.

In a second study (7) Shuman used the same three tests with supervisors in aircraft engine factories. For 208 foremen for whom Shuman regards the criterion as satisfactory, the correlations with ratings are: Test of Mechanical Comprehension, .55; Otis, .51; and Minnesota Paper Form Board, .39.

B. V. Moore (5) of The Pennsylvania State College has investigated the validity of this test with respect to courses in a wartime extension curriculum. For 1834 chemistry students, the correlation with course grades was .36; with final examination, .39. For 292 physics students, the correlation with the final examination was .52.

## EFFECT OF FORMAL TRAINING IN PHYSICS

In the case of 315 applicants for technical defense courses a statement as to previous training in physics was made. For 220 individuals reporting such previous training the mean was 41.7 and the standard deviation 8.6. For 95 persons reporting no training in physics the mean was 39.7 and the standard deviation 8.9. This difference is not statistically significant nor of practical importance.

A further investigation of the effect of prior physics training has been made using the scores of the candidates for positions as firemen or policemen in New York City.

	Number	Mean Score	Sigma
Reporting physics training. . . . .	488	39.6	9.6
Reporting no physics training. . .	983	34.0	9.8

For these 1471 cases the following biserial  $r$ 's were obtained:

	Age	Years of Education	Test Score
Physics — No physics . . . . .	— .085	.332	.260

A second analysis of the effect of physics training was made, holding education constant by using only those high school graduates who had not gone to college. These results were:

	Number	Mean Score	Sigma
Reporting physics training. . . . .	342	39.3	9.6
Reporting no physics training. . .	537	35.1	9.3
Total . . . . .	879	36.7	9.7

This would appear to indicate that the effect of physics training is to raise the mean score by about four points, or less than one half the standard deviation.

## RELIABILITY

The reliability of the Test of Mechanical Comprehension, like that of every test, varies with the nature of the group with which it is used; the greater the spread of ability, the higher will be the coefficient obtained.

For a relatively homogeneous group — about 500 boys in a ninth grade — the coefficient obtained by the split-half method was .84; the standard error of a score for this group was 3.7 points.

TABLE I  
CORRELATIONS BETWEEN TEST OF MECHANICAL COMPREHENSION AND OTHER TESTS

Test	Subjects	Coefficient of Correlation
<b>INTELLIGENCE TESTS</b>		
Otis Self-Administering Test of Mental Ability I.Q.	156 high school students	.25
Otis Self-Administering Test of Mental Ability I.Q.	292 introductory engineering subjects course enrollees	.45
Modified Alpha Examination Form 9	129 veterans in advisory service center	.47
Short Alpha Examination Form 6	220 applicants for apprentice courses	.47
Revised Beta Examination	1322 industrial employees in a paper company	.28
Carnegie Mental Ability Test — Quantitative Score	131 engineering defense training course enrollees	.52
Carnegie Mental Ability Test — Linguistic Score	131 engineering defense training course enrollees	.54
Oral Directions Test	124 veterans in advisory service center	.58
Wonderlic Personnel Test	150 industrial applicants for tractor company	.55
American Council Psychological Examination — Gross Score	212 technical high school seniors	.55
<b>OTHER TESTS</b>		
MacQuarrie Test for Mechanical Ability	136 applicants for WPA mechanical courses	.40
MacQuarrie Test for Mechanical Ability	220 applicants for apprentice courses	.48
Detroit Mechanical Aptitude Examination	136 applicants for WPA mechanical courses	.54
Revised Minnesota Paper Form Board Test	136 applicants for WPA mechanical courses	.59
Revised Minnesota Paper Form Board Test	548 white enlisted Army men	.51
Revised Minnesota Paper Form Board Test	119 veterans in advisory service center	.45
Revised Minnesota Paper Form Board Test	206 technical high school seniors	.44
Revised Minnesota Paper Form Board Test	275 applicants for engineering school	.42
College Entrance Board Physics Examination — Part I	89 veterans in advisory service center	.39
Large Hand-Tool Dexterity Test	1109 industrial employees in a paper company	.28
Large Hand-Tool Dexterity Test	548 white enlisted Army men	.63
Mechanical Aptitude Test — Part I	548 white enlisted Army men	.51
Mechanical Aptitude Test — Part II	548 white enlisted Army men	.69*
Mechanical Aptitude Test — Part III	548 white enlisted Army men	.74*
Mechanical Aptitude Test — Total Score	212 technical high school seniors	.46
Stenquist Mechanical Aptitude Test I	210 technical high school seniors	.61
Stenquist Mechanical Aptitude Test II	190 technical high school senior boys	.40
Squares Test		
<b>WOMEN</b>		
Minnesota Clerical Test — Number Checking	111 college freshmen	-.14
Minnesota Clerical Test — Name Checking	111 college freshmen	.02
Revised Minnesota Paper Form Board Test	111 college freshmen	.18
California Test of Mental Maturity — Arithmetic	111 college freshmen	.38

\* These correlation coefficients are spuriously high as 22 of the 45 items in Part III of the U. S. Army's Mechanical Aptitude Test are from the Test of Mechanical Comprehension Form AA.

TABLE II  
EDUCATIONAL NORMS

Male students in								
	Ninth Grade	Tenth Grade	Eleventh Grade	Twelfth Grade	Technical High School (Seniors)	Introductory Engineering Courses	Engineering School (Freshmen)	
Percentile	Score	Score	Score	Score	Score	Score	Score	Percentile
99	54	53	54	57	56	58	59	99
95	47	48	50	51	53	56	57	95
90	44	44	47	50	50	54	56	90
85	41	41	45	48	49	52	54	85
80	39	40	44	47	47	51	53	80
75	38	39	44	45	46	50	51	75
70	36	38	42	44	45	49	51	70
65	35	36	41	44	43	48	50	65
60	33	35	39	42	42	47	50	60
55	32	33	38	41	41	46	48	55
50	31	32	36	39	40	45	47	50
45	30	29	35	38	39	43	47	45
40	29	27	33	36	37	42	45	40
35	27	26	32	35	36	41	45	35
30	26	24	31	33	34	40	44	30
25	23	24	29	32	32	39	42	25
20	22	23	27	29	30	37	40	20
15	20	20	25	27	28	35	38	15
10	17	17	21	23	25	33	36	10
5	14	13	17	20	18	27	32	5
1	5	9	8	11	11	21	26	1
No. of cases	833	370	348	300	402	556	613	No. of cases
Mean	30.8	31.2	35.4	38.1	*	*	46.2	Mean
Sigma	10.4	10.6	10.0	10.2	*	*	7.7	Sigma

\*These data not available.



## INDUSTRIAL AND OTHER NORMS

## CANDIDATES FOR

Percentile	WPA Mechanical Courses		Policeman and Fireman Positions		Apprentice Training Courses		Technical Courses		Engineering Positions		Industrial Workers in Paper Factory		Applicants for Mechanic's Helper		Veterans in Guidance Center		Applicants for Unskilled Jobs		Bus and Street Car Operators		Candidates for Leadman Jobs		Trainees in Airplane Factory		Men in Defense Training Course	
	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile	Score	Percentile
99	54	99	56	99	59	99	60	99	55	99	55	99	54	99	55	99	57	99	56	99	57	99	59	99	57	99
95	47	95	51	95	54	95	59	95	50	95	50	95	51	95	51	95	53	95	51	95	52	95	56	95	54	95
90	45	90	48	90	53	90	58	90	46	90	46	90	48	90	48	90	51	90	50	90	50	90	53	90	51	90
85	43	85	47	85	50	85	57	85	44	85	44	85	47	85	46	85	48	85	48	85	49	85	52	85	49	85
80	41	80	44	80	48	80	57	80	43	80	43	80	45	80	44	80	46	80	46	80	47	80	51	80	48	80
75	38	75	42	75	48	75	56	75	41	75	41	75	44	75	43	75	45	75	45	75	46	75	50	75	47	75
70	36	70	41	70	47	70	55	70	40	70	40	70	42	70	41	70	43	70	44	70	45	70	48	70	45	70
65	35	65	39	65	45	65	54	65	38	65	38	65	39	65	40	65	42	65	42	65	44	65	47	65	43	65
60	33	60	39	60	45	60	53	60	37	60	37	60	38	60	38	60	41	60	41	60	43	60	45	60	42	60
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50	30	50	36	50	42	50	52	50	34	50	34	50	35	50	36	50	38	50	39	50	40	50	43	50	40	50
45	29	45	35	45	41	45	51	45	32	45	32	45	33	45	34	45	37	45	38	45	39	45	42	45	38	45
40	28	40	33	40	41	40	51	40	31	40	31	40	32	40	33	40	35	40	37	40	38	40	39	40	37	40
35	26	35	32	35	39	35	50	35	29	35	29	35	30	35	32	35	33	35	36	35	37	35	38	36	36	35
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15	17	15	24	15	32	15	45	15	20	15	20	21	21	15	25	15	27	30	30	15	29	29	29	27	27	15
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5	10	5	18	5	26	5	38	5	15	5	15	12	12	5	16	5	17	24	24	5	23	17	17	20	20	5
1	5	1	9	1	17	1	31	1	6	1	6	6	6	1	13	1	14	12	12	1	13	5	5	14	14	1

No. of cases	252	1836	548	744	145	1637	2217	533	417	734	249	226	775	No. of cases
Mean	30.2	35.6	36.6	41.6	50.9	33.1	34.1	35.2	37.8	38.6	39.1	40.9	**	Mean
Sigma	11.6	10.1	9.9	10.1	6.4	10.7	11.5	10.4	9.9	8.8	9.3	11.4	**	Sigma

Educational mean*	10.6	11.6	10.7	12.4	13.9								
Educational sigma*	2.2	1.4	2.0	1.7	1.2								
Educational range*	5-16	7-16	5-15	7-16	10-16								

Age mean	24.6	22.5	23.8	26.5	26.8								
Age sigma	7.3	2.5	3.7	6.8	4.6								
Age range	17-60	18-28	18-40	16-58	18-37								

\* Education is given in years. Only years completed were recorded. Twelve years of schooling indicates that the student has had four years of high school.  
 \*\* These data not available.

TABLE IV

## WOMEN'S NORMS

	College Freshmen	Trainees in Airplane Factory	Applicants for Wartime Employment through Employment Agency	
Percentile	Score	Score	Score	Percentile
99	47	48	53	99
95	38	42	47	95
90	36	39	45	90
85	33	36	43	85
80	31	33	41	80
75	29	32	39	75
70	28	30	36	70
65	27	29	35	65
60	26	27	33	60
55	24	26	32	55
50	23	25	30	50
45	22	24	28	45
40	21	23	27	40
35	20	21	26	35
30	18	19	24	30
25	17	18	23	25
20	14	15	21	20
15	12	14	20	15
10	9	11	17	10
5	8	6	14	5
1	4	0	5	1
No. of cases	111	1090	238	No. of cases
Mean	23.30	24.66	30.51	Mean
Sigma	9.67	10.48	10.78	Sigma

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Standardization acknowledgments appear in the previous edition of this manual.



**Defendant's Exhibit 5**

Age, Weight, Educational Qualifications, etc.

Hiring new employees to fill vacancies without giving present employees a preference or an opportunity to bid on such jobs is not, without more, a violation of Title VII. Opinion Letter, 10/6/65; GC 252-65.

Differential in pay not based on one of the Act's prohibited grounds, i.e., sex or race, etc. is not an unlawful employment practice. Opinion Letter, 10/2/65; GC 281-65.

Discriminatory practice whereby watchmen, firemen and maintenance employees are denied a higher rate of pay for overtime work, while other employees are paid an overtime differential, is not within Commission's jurisdiction. Opinion Letter, 10/2/65; GC 318-65.

Commission has no authority over discriminatory employment practices based on age.

Opinion Letter, 10/1/65; GC 178-65

Opinion Letter, 10/1/65; GC 192-65

Opinion Letter, 10/2/65; GC 254-65

Opinion Letter, 10/2/65; GC 228-65

Opinion Letter, 10/6/65; GC 332-65

Company refusal to hire employees who weigh more than a stated number of pounds is not a violation of Title VII. Opinion Letter, 10/2/65; GC 325-65.

Discrimination based on educational qualifications does not violate Title VII. Opinion Letter, 10/2/65; GC 296-65.

APR 9 1970

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. ~~1403~~ 124WILLIE S. GRIGGS, *et al.*,*Petitioners,*

v.

DUKE POWER COMPANY, a Corporation,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 9, 1970.

**Opinions Below**

The opinion of the Court of Appeals and accompanying dissent of Judge Sobeloff is reported at — F.2d —, 61 Lab. Cas. ¶9379. The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). All opinions are reprinted in the Appendix hereto.

## **Jurisdiction**

The judgment of the Court of Appeals for the Fourth Circuit was entered January 9, 1970 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## **Questions Presented**

Whether the intentional use of psychological tests and related formal educational requirements as employment criteria violates the race discrimination prohibition of Title VII, Civil Rights Act of 1964, where:

- (1) the particular tests and standards used exclude Negroes at a high rate while having a relatively minor effect in excluding whites, *and*
- (2) these tests and standards are not related to the employer's jobs.

## **Statutory Provisions Involved**

United States Code, Title 42:

§2000e-2(a) [703(a) of Civil Rights Act of 1964]

- (a) It shall be an unlawful employment practice for an employer—
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§2000e-2(h) [§703(h) of Civil Rights Act of 1964]

- (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

§2000e-5(g) [§706(g) of Civil Rights Act of 1964]

- (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

### **Statement of the Case**

This is a class action under Title VII of the Civil Rights Act of 1964, brought by a group of Negro workers against their employer, the Duke Power Company. Petitioners challenge the company's promotional system on the ground that it effectively denies them as a class equal opportunity to jobs above the laborer category. The action was commenced following proceedings before the Equal Employment Opportunity Commission in which reasonable cause was found to believe that the company was engaged in gross practices of racial discrimination (R. 2b-4b).<sup>1</sup>

The Duke Power Company operates a generating plant at Draper, North Carolina, known as the Dan River Steam

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<sup>1</sup> Record citations are to the printed record prepared for proceedings before the Fourth Circuit. Both that record and the original record are on file with the clerk of this Court.

Station, where petitioners are employed (R. 55a). The employees at this plant are divided into five departments: Operations, Maintenance, Laboratory & Test, Coal Handling, and Labor. Employees in the Coal Handling and Labor Departments work outside the plant (R. 55a-58a). Employees in all other departments work "inside" the plant and, for convenience, these other departments will be collectively referred to as the "inside" departments.<sup>2</sup>

Negroes have been employed at the plant for a number of years. There are now 14 Negroes out of 95 employees (R. 19b). But, as the District Court found, until

"some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race" (R. 32a).

The Labor Department is the least desirable one in the plant and is the lowest paid. The maximum wage ever earned by a Negro in the Labor Department is \$1.565 per hour (R. 72b). This maximum is less than the minimum (\$1.705) paid to any white in the plant (R. 72b). It is drastically less than the maximum wage paid to whites in the Coal Handling and "inside" departments where top jobs pay from \$3.18 to \$3.65 per hour (R. 72b).

The first breach in the practice of relegating Negroes to the Labor Department did not occur until August 6, 1966, when a Negro was promoted to the Coal Handling Department (R. 72b). No Negro has yet been promoted to one of the more desirable "inside" jobs at the plant.

By the time of trial Duke had apparently dropped its formal policy of restricting all Negroes to the Labor Department. However, the effect of that policy has largely

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<sup>2</sup> There are also a few miscellaneous non-department jobs (R. 58a). All of these except the watchmen are located inside.

been preserved by a company policy precluding anyone from transferring to any job in the Coal Handling Department or in one of the "inside" departments unless he either (1) had a high school diploma or (2) achieved a particular score on each of two quickie "intelligence" tests— the 12 minute Wonderlic test and the 30 minute Bennett test (sometimes referred to as the "Mechanical AA" in the Record) (R. 20b-22b).<sup>3</sup> These requirements were adopted without study or evaluation. They applied even to several Negro laborers who have worked in the Coal Handling Department for many years and thereby gained experience and familiarity with the operations of the department (R. 106a, 124b). On the other hand, the requirements had no application whatsoever to anyone already in the Coal Handling Department or an "inside" department, either as a requirement for maintaining his present position or as a condition to further promotion within his departmental area (R. 102a).

The practical effect of this transfer requirement was to freeze all but two or three Negroes in Duke's low paying

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<sup>3</sup> These tests include questions such as:

"No. 11. ADOPT ADEPT—Do these words have

1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 19. REFLECT REFLEX—Do these words have

1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 24. The hours of daylight and darkness in SEPTEMBER are nearest equal to the hours of daylight in

1. June
2. March
3. May
4. November" (R. 101b-103b).

laborer jobs. On the other hand, employees in the "inside" departments, all of whom are white, were free to remain there and to receive promotions in the "inside" departments to the best paying jobs in the plant (from \$3.18 to \$3.56 per hour) without meeting either of these requirements (R. 72b, 102a). Within the past three years, for example, white employees with as little as seventh grade educations were promoted to jobs paying \$3.49 per hour in "inside" departments (R. 83b, 127b). Likewise, employees in the Coal Handling Department, all of whom are white except for one Negro high school graduate transferred there in 1966, were free to remain on their jobs and be promoted to the top job in the department paying \$3.41 per hour.<sup>4</sup>

The first of these transfer requirements (high school diploma) was in effect for a number of years prior to this action (R. 20b). The second (passing a test battery) was newly adopted in September, 1965, in response to a request from a number of white non-high school graduates in the Coal Handling Department who wanted an alternative chance for promotion to inside jobs (R. 85a-87a). Both were being challenged by appellants on the grounds that (1) they impose a special burden on Negro employees at Dan River not equally imposed upon white employees, and (2) even if equally imposed that they constitute discriminatory requirements for transfer which are not justified by the job needs of Duke.

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<sup>4</sup> The only whites on whom the transfer requirements have any impact are those few who work outside the plant in the Coal Handling Department and the watchman job and wish to transfer inside. It was at the request of these employees that the test alternative was introduced. However, since the Coal Handling Department leads to a top pay rate of \$3.41, the impact of transfer requirements on these employees is far less harsh than that on Negroes who are hopelessly frozen in low paid jobs. Moreover, only fifteen of eighty-one white employees are in these outside jobs (R. 73b).



The District Court ruled against petitioners on both counts. The Court of Appeals accepted petitioners claims in part, holding that the test and educational requirements were unlawful as applied to Negro workers hired prior to the date when the high school requirement was first imposed. However, the appellate court with Judge Sobeloff dissenting, denied all relief to Negro workers hired subsequent to that date on the ground that these newer workers were being treated equally with their white contemporaries.

### Reasons for Granting Writ

The importance of this case was eloquently stated in Judge Sobeloff's dissent below:

"The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years.

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"The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified. . . . *On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.*"

— F.2d at —, 61 Lab. Cas. ¶9379 at 6995-25.  
(Emphasis added.)

A writ of certiorari should be granted not only because of the overriding importance of this case, but also because the decision below is in direct conflict with the interpretation given Title VII in other circuits and with prior decisions of this Court on analogous questions.

## I.

**This Case Is of Overriding Importance. The Decision Below Is an Open Invitation to Racial Discrimination Through Use of Irrelevant Tests and Educational Standards Which Will Effectively Deny Employment Opportunity to Most Negroes Despite Their Job Qualifications.**

Objective criteria, such as tests and educational requirements are well known to be potent tools for substantially reducing Negro job opportunities, often to the extent of wholly excluding Negroes. In one typical case, the Equal Employment Opportunity Commission found that use of a battery of tests, including the Wonderlic and Bennett tests used by Duke Power Company, resulted in 58% of whites passing the tests but only 6% of Negroes.<sup>5</sup> A flood of other studies confirm a gross racial disparity in test scores, particularly on the Wonderlic test which is closely related to academic and cultural background.<sup>6</sup> The same disparate effect also results in the South when a high school diploma requirement is imposed. As of the last census, only 12% of North Carolina Negro males had completed high school, as compared to 34% of North Carolina white males.<sup>7</sup>

Based on these facts, numerous courts and governmental equal employment agencies have recognized that any interpretation of equal employment law which would permit

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<sup>5</sup> Decision of EEOC, Dec. 2, 1966, reprinted in Brief for Appellants below, at 51-52.

<sup>6</sup> See J. Kirkpatrick, et al., *Testing and Fair Employment* 5 (1968); authorities collected in Cooper & Sobol, *Seniority and Testing under Fair Employment Laws*, 82 Harv. L. Rev. 1598, 1639-41 nn. 11, 13, 14, 15, 16, 17.

<sup>7</sup> U.S. Bureau of the Census, *U.S. Census of Population: 1960*, Vol. 1, Part 35, at Table 47 p. 167.

virtual unrestricted use of tests and educational standards would, in effect, license employers to give an employment preference to whites of as much as ten to one. These courts and agencies have therefore united in insisting on job-relatedness as the *sine qua non* of fair use of tests and educational standards. For example, the Equal Employment Opportunity Commission calls for tests to:

“fairly measure the knowledge or skills required by the particular job or class of jobs which the applicant seeks.” EEOC, Guidelines on Employment Testing Procedures (1966), reprinted at R. 129b, 130b.<sup>8</sup>

A requirement that tests and educational standards be job-related assures that employees will be hired on the basis of their ability to perform, which is fair. But a test or educational requirement that is not job-related assures only that hiring will be on the basis of educational and cultural background, which, at least in this society, is only thinly veiled racial discrimination. Other courts and agencies are overwhelmingly in accord with the EEOC.<sup>9</sup>

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<sup>8</sup> The EEOC takes a similar position regarding education requirements. See EEOC Decision, Dec. 6, 1966, reprinted in Brief for Appellants below, at 53-55.

<sup>9</sup> U.S. Dept. of Labor, Validation of Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246, 33 Fed. Reg. 14392 (Sept. 24, 1968); *Arrington v. Massachusetts Bay Transportation Authority*, 61 Lab. Cas. 9375, at 6995-12 (D.C. Mass. Dec. 22, 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 433-34 (S. D. Ohio 1968); *United States v. H. K. Porter Co.*, 296 F. Supp. 40, 78 (N. D. Ala. 1968) appeal noticed 5th Cir. No. 27703; California, Fair Employment Practices, Equal Good Employment Practices, in CCH Employment Practices Guide ¶20,861; Colorado Civil Rights Commission Policy Statement on the Use of Psychological Tests, in CCH Employment Practices Guide ¶21,060; Pennsylvania Human Relations Commission, Affirmative Action Guidelines for Employment Testing, in CCH Employment Practices Guide ¶27,295.

The decision below, however, rejected the job-relatedness standard. The Court of Appeals recognized that,

"The [District Court] held that the tests given by Duke were not job-related. . . ." — F.2d at —; 61 Lab. Cas. ¶9379 at 6995-22.

But the court went on to hold that this lack of job-relatedness was of no moment under Title VII. Although the court did acknowledge that it was not holding that "any educational or testing requirement adopted by any employer is valid under the Civil Rights Act of 1964", it laid down no substitute standard or guidepost to replace the rejected job-relatedness standard, except to say that each case must be decided on its facts.

This ruling was contrary to established principles calling for judicial deference to the contemporaneous interpretation of the agency charged with enforcement of a complex law,<sup>10</sup> a principle that has particular applicability to the EEOC.<sup>11</sup>

Furthermore, the practical effect of this decision below will be to permit virtual unrestricted use of tests and educational requirements. The facts in this case are that the Duke Power Company offered no justification for imposing its test and educational requirements other than a blind hope, unsupported by any study, evaluation or analysis, that these requirements would help produce better employees. (R. 103a-104a). The evidence in the record of successful job performance by and the grant of recent high level promotions to numerous white employees not meeting these requirements refutes this notion. (e.g. R. 83b, 127b)

<sup>10</sup> *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

<sup>11</sup> *Cox v. United States Gypsum Co.*, 284 F. Supp. 74, 78 (N.D. Ind. 1968) Aff'd as modified 409 F.2d 289 (7th Cir. 1969); *International Chem. Workers v. Planters Mfg. Co.*, 259 F. Supp. 365, 366-367 (S. D. Miss. 1966).

Moreover, an extensive body of professional literature on test and educational requirements clearly establishes that such requirements are unsound and contrary to an employer's interest unless properly related to job needs.<sup>12</sup>

The tests used by Duke are the ones most frequently subjected to challenge under fair employment laws.<sup>13</sup> If Duke is permitted to use these test and educational requirements on this record, then virtually any employer will be able to impose such requirements at any time. Such tests are already in widespread use and this use appears to be growing as more employers come under fair employment scrutiny.<sup>14</sup> Moreover, the door will be open to other requirements having similar racial effect. For if the door is open to tests without any showing of job relatedness, then it will be difficult to close it to nepotie practices, hiring preferences to friends of existing employees, geographic hiring preferences to people from a particular community, and a myriad practices which are neutral on their face but which effectively discriminate against Negroes. Thus the Equal Employment Opportunity Act will be reduced to "hollow rhetoric."<sup>15</sup>

We believe that a job-relatedness standard is essential to the efficacy of Title VII and if the writ is granted, will urge this Court to adopt such a standard.

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<sup>12</sup> See authorities collected in Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 Harv. L. Rev. 1558, 1642-49 nn. 24-39, 1670 n. 2 (1969).

<sup>13</sup> *Id.* at 1643 n. 21.

<sup>14</sup> *Id.* at 1637-38.

<sup>15</sup> Although the Court of Appeals attempted to justify its decision on the legislative history of Title VII, it is clear that nothing in the legislative history compels such a self destructive interpretation of the Act. For reasons set out in Judge Sobeloff's dissent, which we will develop more fully in a brief on the merits, a job-relatedness standard is far more consistent with the legislative history than the interpretation of the court below. See Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 Harv. L. Rev. 1598, 1649-54 (1969).

## II.

**The Decision Below Is in Direct Conflict With the Interpretation Given Title VII of the Civil Rights Act of 1964 in Other Circuits.**

The use of tests and educational requirements is but one example of the new breed of racial discrimination. While outright and open exclusion of Negroes is passe, the use of neutral, objective criteria which systematically reduce Negro job opportunity are producing much the same result. The result is sometimes desired and sometimes inadvertent, but its devastating effect on Negro employment is plain.<sup>18</sup>

The initial series of cases challenging an objective criterion that caused racial discrimination was directed to certain seniority rules. These rules preferred white workers over their black contemporaries on the basis of seniority acquired when the black workers had been subject to outright exclusion from desirable jobs. The courts were virtually unanimous in concluding that such seniority rules, even though adopted innocently for nonracial reasons, could not be sustained where they had the effect of barring black workers from jobs they were capable of performing. This Court has recently denied certiorari in the leading case on that issue. *United States v. Local 189*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, — U.S. (1970); see *United States v. Hayes Int'l. Corp.*, 415 F.2d 1038 (5th Cir. 1969); *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969); *Dobbins v. Local 212*,

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<sup>18</sup> Negro unemployment has consistently run at roughly double the white rate for the past two decades. While there was some improvement in the ratio in 1969, earlier figures for 1970 show a worsening again. For February, 1970 the Negro rate was 7% as compared to a white rate of 3.8%. N. Y. Times, March 7, 1970, at p. 1.

*IBEW*, 292 F. Supp. 413 (N.D. Ohio 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The Fifth Circuit has also applied the same principle to strike down nepotic practices in an all-white union. *Local 53, Heat & Frost Insulators Workers v. Vogler*, 407 F.2d 1047, 1054-55 (5th Cir. 1969).<sup>17</sup>

As Judge Sobeloff's dissenting opinion below explained, the teaching of these seniority and nepotism cases is that:

"the statute interdicts practices that are fair in form, but discriminatory in substance . . . The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end."  
— F.2d —; 61 Lab. Cas. ¶9379 at 6995-26.

Judge Sobeloff went on to observe that this principle applies no less to discriminatory tests and educational requirements than to seniority and nepotism. Where such requirements are not job-related they are not justified by business necessity and must be struck down.<sup>18</sup>

The court below acknowledged the correctness of the numerous decisions on seniority and cited the leading case, *United States v. Local 189*, *supra*, with approval. However, in failing to recognize that its decision regarding tests and educational requirements was fundamentally inconsistent with the principle which that case established in the seniority context, the court below set up a conflict between circuits which this Court should resolve.

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<sup>17</sup> There is one District Court decision contra in the Fifth Circuit, *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. No. 27703. This decision preceded the Court of Appeals, *Local 189* and *Hayes Int'l. Corp.* decisions, cited above, and is plainly overruled by them.

<sup>18</sup> See Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 Harv. L. Rev. 1598, 1669-73 (1969).

Moreover, although no other Court of Appeals has dealt specifically with issues of testing and educational requirements, at least two District Courts in other circuits have done so, and have resolved the issue contrary to this case. Most explicit is *Arrington v. Massachusetts Bay Transportation Authority*, 61 Lab. Cas. ¶9375 (D. Mass. Dec. 22, 1968):

“[I]f there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them equal opportunity for public employment, then it becomes unconstitutionally unreasonable and arbitrary.” 61 Lab. Cas. at 6995-12.

This was, of course, a decision based on the Fourteenth Amendment. But the same view was adopted under Title VII in *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. no. 27703. There the court reasoned:

“the court agrees in principle with the proposition that aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs.” 296 F. Supp. at 78 (dictum).

Other District Courts have also indicated adherence to a similar point of view. See *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 433-34, 439 (S.D. Ohio 1968); *Penn v. Stumpf*, 62 Lab. Cas. ¶9404 (N.D. Calif. Feb. 3, 1970). But cf. *Parham v. Southwestern Bell Telephone Co.*, — F. Supp. —; 60 Lab. Cas. ¶9297 (W.D. Ark. 1969) appeal noticed 8th Cir. no. 19969.



## III.

**The Decision Below Is in Direct Conflict With Other Decisions of This Court on Analogous Questions.**

This Court has long recognized that "sophisticated as well as simple minded modes of discrimination" are outlawed.<sup>19</sup> Under this concept, the Court has struck down a wide range of practices which are neutral in form but have a racially discriminatory effect. This has included use of grandfather clauses for voter registration,<sup>20</sup> the use of tuition grant arrangements which foster segregated schools,<sup>21</sup> and the use of a gerrymander which undercuts Negro voting power.<sup>22</sup> Most recently, the Court has applied this principle to bar use of literacy tests which have a racially discriminatory effect. In *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969), the appellant sought to impose a literacy test requirement for voter registration. Although the test was to be fairly and impartially administered and thus neutral on its face, the Court barred its use because of the racially discriminatory impact it would have on Negroes who suffered the burdens of educational discrimination. 395 U.S. at 296-297. Use of the literacy test would unnecessarily capitalize on the existing educational disparity between blacks and whites.

By the same token, use of test and educational requirements by Duke would unnecessarily capitalize on educational and cultural disparities between the races beyond

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<sup>19</sup> *Lane v. Wilson*, 307 U.S. 268, 275 (1938).

<sup>20</sup> *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>21</sup> *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

<sup>22</sup> *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

the employer's demonstrated job needs. To permit such unnecessary test use would establish a principle under Title VII which is basically inconsistent with concepts evolved by this Court in all other areas of racial discrimination.

### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

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**Opinion of the District Court**

**UNITED STATES DISTRICT COURT**

**M. D. NORTH CAROLINA**

**GREENSBORO DIVISION**

**Sept. 30, 1968**

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**WILLIE S. GRIGGS, et al.,**

*Plaintiff,*

**vs.**

**DUKE POWER COMPANY,**

*Defendant.*

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**JUDGMENT DISMISSING COMPLAINT**

**GORDON, District Judge.**

Duke Power Company, the defendant in this action, is a corporation engaged in the generation, transmission, and distribution of electric power to the general public in North Carolina and South Carolina. The thirteen named plaintiffs are all Negroes and contend that the defendant has engaged in employment practices prohibited by Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. at its Dan River Station located in Draper, North Carolina (recently consolidated with the Towns of Leaksville and Spray and named Eden) and ask that such discriminatory practices be enjoined.

*Opinion of the District Court*

An order was entered on June 19, 1967, allowing the action to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure. The class was defined as those Negroes presently employed, and who subsequently may be employed, at the Dan River Steam Station and all Negroes who may hereafter seek employment at the Station. The Court has found no reason to alter the June 19 Order.

The evidence in this case establishes that due to the requirements for initial employment, Negroes who may subsequently be employed by defendant would not be subject to the restrictions on promotions which the named plaintiffs contend are violative of the Act. A high school education and satisfactory test scores are required for initial employment in all departments except labor. Plaintiffs certainly cannot contend that employees without those requisites who are hired for the labor department subsequent to the implementation of the requisites should be allowed to transfer into other departments when they could not have been initially employed in those departments. This would be to deny the defendant the right to establish different standards for different types of employment. Further, the plaintiffs do not contend that the defendant's requirements for initial employment are discriminatory. Only fourteen Negroes are presently employed by the defendant, thirteen of whom are named plaintiffs.

The work force at Dan River is divided for operational purposes into the following departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The jobs of watchman, clerk, and storekeeper are in a miscellaneous category.

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Within each department specialized job classifications exist.<sup>1</sup> These classifications constitute a line of progression for purposes of employee advancement. The term "line of progression" is then synonymous with "department."

Approximately ten years ago,<sup>2</sup> the defendant initiated a policy making a high school education or its equivalent a

<sup>1</sup> Answer to Interrogatory No. 11:

#### POWER STATION OPERATORS

Control Operator  
Pump Operator  
Utility Operator  
Learner

#### COAL AND MATERIAL HANDLING

Coal Handling Foreman  
Coal Equipment Operator  
Coal Handling Operator  
Helper  
Learner

#### MAINTENANCE

Machinist  
Electrician-Welder  
Mechanic A  
Mechanic B  
Repairman  
Learner

#### TEST AND LABORATORY

Testman-Labman  
Lab and Test Technician  
Lab and Test Assistant

#### LABOR

Labor Foreman  
Auxiliary Serviceman  
Laborer (Semi-Skilled)  
Laborer (Common)

#### MISCELLANEOUS

Watchman  
Clerk  
Chief Clerk  
Storekeeper

#### SUPERVISORS

Superintendent  
Assistant Superintendent  
Plant Engineer  
Assistant Plant Engineer  
Chemist  
Test Supervisor  
Maintenance Supervisor

Assistant Maintenance  
Supervisor  
Shift Supervisor  
Junior Engineer

<sup>2</sup> At the trial of this case, objections by defendant to evidence of activities prior to July 2, 1965, were sustained and the evidence recorded. Upon a study of briefs subsequently submitted by the parties, the Court has for purposes of this case only, considered the evidence as competent and relevant.

### *Opinion of the District Court*

prerequisite for employment in all departments except the labor department. The effect of the policy was that no new employees would be hired without a high school education (except in the labor department) and no old employees without a high school education could transfer to a department other than the labor department. The high school requirement was made applicable on a departmental level only, and was not the basis for firing or demoting a person employed prior to its implementation.

In July of 1965 the defendant instituted a new policy for initial employment at the Dan River Station. A satisfactory score on the Revised Beta Test was the only requirement for initial employment in the labor department. In all other departments and classifications, applicants were required to have a high school education *and* make satisfactory scores on two tests, the E. F. Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test, Form AA. The company's promotional policy was unchanged and a high school education remained the only prerequisite to a departmental transfer.

In September, 1965, at the instigation of employees in the coal-handling department, the defendant promulgated a policy by which employees in the coal-handling and labor departments and the watchman classification without a high school education could become eligible for consideration for transfer to another department by attaining a satisfactory score on the two tests previously mentioned. This procedure was made available only to persons employed prior to September 1, 1965.

### *Applicable Provisions of the Act*

Sections 703(a) (1) and (2) of Title VII of the 1964 Civil Rights Act provide:

*Opinion of the District Court*

"Section 703(a), 42 U.S.C. § 2000e-2(a):

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The mandate of those two sections is qualified by the following sections of the Act:

"Section 703(h), 42 U.S.C. § 2000e-2(h):

"Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such

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test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 206(d))."

"Section 703(j), 42 U.S.C. § 2000e-2(j) :

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Congress intended the Act to be given prospective application only. Any discriminatory employment prac-



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tices occurring before the effective date of the Act, July 2, 1965, are not remedial under the Act.<sup>3</sup>

The plaintiffs first contend that they are restricted to the menial and low-paying jobs and are effectively denied an equal opportunity to advance to the more remunerative positions because of their race.

The evidence shows that there are approximately 95 employees at the Dan River Station, 14 of whom are Negroes. As of July 2, 1965, the 14 Negroes held jobs in the labor department which has a lower pay scale than any other department. On August 8, 1966, three months prior to the institution of this suit, Jesse Martin, the senior Negro laborer with a high school education was promoted to learner in the coal handling department. The 13 Negroes remaining in the labor department are the plaintiffs in this action. One of those, R. A. Jumper, the next senior Negro laborer with a high school education has since been promoted to the watchman position. Only one other Negro has a high school education. Actually, the high school and testing requirements which plaintiffs allege are violative of the Act affect only those plaintiffs without a high school education.

The evidence shows that only three of the nine white employees in the coal handling department have a high school education; only eight of the seventeen white employees in the maintenance department have a high school education; two white shift supervisors in the power plant have less than a high school education; the two coal handling foremen have less than a high school education, and the labor foreman has less than a high school education.

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<sup>3</sup> Actually, the evidence places the number of defendant's employees between 90 and 95. The Act was not made applicable to employers with under 100 employees until July 2, 1966.

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Although company officials testified that there has never been a company policy of hiring only Negroes in the labor department and only whites in the other departments, the evidence is sufficient to conclude that at some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race.

The plaintiffs contend that upon their initial employment they were placed in the low paying labor department and were denied access to the more desirable departments as a result of the defendant's discriminatory hiring and promotional policies. Since the discrimination occurred prior to July 2, 1965, it is not remedial under the 1964 Civil Rights Act. But the plaintiffs reason that in subsequently applying the high school education requirement on a departmental basis only, the initial discrimination was carried over and continues to the present. This result, they say, is demonstrated by the fact that white employees without a high school education are eligible for job openings in the more lucrative departments while Negro employees with the same or similar educational qualifications are restricted to job classifications in the lower paying labor department.

Under plaintiffs' theory, the departmental structure of defendant's work force is tainted by prior discriminatory practices and therefore cannot serve as a basis for applying educational or general intelligence standards as prerequisites to promotion. Plaintiffs contend that the present system continues the past discrimination and violates the Act.

The plaintiffs do not contend nor will the evidence support a finding that the division of defendant's work force into departments is an unreasonable system of classifica-

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tion. To the contrary, the evidence shows that jobs within each department require skills which differ in degree and kind from the skills required in the performance of jobs in other departments. Also, each department has a different function in the total operation of the plant.

The plaintiffs do not contend that discrimination on the basis of education is proscribed by the Act. But they do contend that a high school education requirement which of itself continues the inequities of prior racial discrimination is prohibited.

This theory brings into issue how Congress intended the Act to be applied.

The legislative history of the Act is replete with evidence of Congress' intention that the Act be applied prospectively and not retroactively. Clark-Case Memorandum, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 329; Justice Dept. Reply on Title VII, Bureau of Nat'l Affairs Operations Manual, The Civil Rights Act of 1964, p. 326.

In providing for prospective application only, Congress faced the cold hard fact of past discrimination and the resulting inequities. Congress also realized the practical impossibility of eradicating all the consequences of past discrimination. The 1964 Act has as its purpose the abolition of the policies of discrimination which produced the inequities.

It is obvious that where discrimination existed in the past, the effects of it will be carried over into the present. But it is also clear that policies of discrimination which existed in the past cannot be continued into the present under the 1964 Act. Plaintiffs do labor under the inequities resulting from the past discriminatory promotional policies of the defendant, but the defendant discontinued those

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discriminatory practices. More than ten years ago it put into effect a high school education requirement intended to eventually upgrade the quality of its entire work force. At least since July 2, 1965, the requirement has been fairly and equally administered.

The requirement was made applicable to a departmentalized work force without any intention or design to discriminate against Negro employees. The departments serve as a reasonable system of classification with each department having a different function and each department requiring different skills. It is important to remember that the departmental structure does not result in Negroes doing the same or similar work as white employees but receiving smaller wages. The past discrimination was in restricting Negroes to the menial and low paying jobs in the labor department. Had Negroes not been restricted in this fashion prior to the institution of the high school education requirement, there would be no question of the present legality of defendant's policies.

If the relief requested by plaintiffs is granted, the defendant will be denied the right to improve the general quality of its work force or in the alternative will be required to abandon its departmental system of classification and freeze every employee without a high school education in his present job without hope of advancement. And these harsh results would be necessary, under plaintiffs' theory, because of discriminatory practices abandoned by the defendant over ten years ago.

It is improbable that any system of classification used by an employer who has discriminated prior to the effective date of the Act could escape condemnation if this theory prevailed, regardless of how fair and equal its present policies may be. This Court does not believe such

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application of the Act to have been contemplated by Congress. Otherwise, it would have been unnecessary to indicate an intention that the Act receive only prospective application.

The plaintiffs cite *Quarles v. Philip Morris, Inc.*, 279 F.Supp. 505 (1968), a decision in the Eastern District of Virginia. That case held that restrictions on departmental transfers where the departments had been organized on a racially segregated basis were violative of the Act. Interdepartmental transfers had been completely prohibited under the prior discriminatory practices. Provisions of two collective bargaining agreements negotiated in the fall of 1964 and effective over a three-year period from February 1, 1965, modified the previous no-transfer policy only to the extent that a limited number of employees from the previously all-Negro departments would be allowed to transfer to the previously all-white department. A "Memorandum of Understanding" executed on March 7, 1966, modified seniority and transfer provisions only in degree. These provisions, in effect, continued the old discriminatory no-transfer policies except that four Negroes were allowed to transfer every six months without effect on their seniority rights. These present practices retained the discriminatory flavor of the past and were held violative of the Act.

The restrictions on departmental transfers at Duke Power's Dan River Station are distinguishable from the restrictions of Philip Morris, Inc., condemned in *Quarles*. The restrictions on interdepartmental transfers at Duke Power are based on educational requirements whereas the policy at Philip Morris represented only a relaxation of earlier restrictions based on race. Philip Morris exhibited no business purpose or reason for its transfer restrictions,

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but as pointed out heretofore, Duke Power had legitimate reasons for its educational and intelligence standards and for applying those standards to its departmental structure.

If the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise. The text of the legislation redounds with the term "unlawful employment practice." There is no reference in the Act to "present consequences." Moreover, under no definition of the words therein can the terms "present consequences of past discrimination" and "unlawful employment practice" be given synonymous meanings.

This does not mean that a court cannot look beyond the effective date of the Act to determine whether present practices are discriminatory. That, in fact, was what the court did in the *Quarles* case.

Plaintiffs secondly contend that the defendant's policy of allowing passing marks on two general intelligence tests to substitute for a high school education in determining eligibility for departmental transfer is discriminatory and in violation of the Act.

The application of defendant's testing procedures on a departmental basis is not in violation of the Act for the same reasons expressed previously in the discussion of the high school requirement.

In light of this Court's holding that the defendant's policy of making a high school education a prerequisite to departmental transfers is non-discriminatory, it would appear to be in derogation of the plaintiffs' interest to abolish the use of test scores as a substitute for the high school requirement. But to the extent that the nature of the tests may be discriminatory, their validity under the Act must be examined.

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Section 703(h), (42 U.S.C. § 2000e-2(h)) of the Act provides that it shall not be

“[A]n unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.”

The clause was inserted by an amendment introduced by Sen. Tower (R.Tex.). It was designed to insure the employer's right to utilize ability tests in hiring and promoting employees which practice had been condemned by a hearing examiner for the Illinois Fair Employment Practices Commission.

The plaintiffs apparently read the section to allow tests only when they are developed to predict a person's ability to perform a *particular* job or group of jobs. That is, if the job requires only manual dexterity, then the Act requires an employer to utilize only a test that measures manual dexterity. Guidelines on employment testing procedures set out by the Equal Employment Opportunity Commission serve to fortify that appraisal of the Act:

“The Commission accordingly interprets ‘professionally developed ability test’ to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs.”

This Court cannot agree to this interpretation of § 703(h). Title VII of the 1964 Act has as its purpose the



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elimination of discriminatory employment practices. It precludes the use of ability tests which may be used to discriminate on the basis of race, color, religion, sex, or national origin. Nowhere does the Act require that employers may utilize only those tests which accurately measure the ability and skills required of a particular job or group of jobs. Nowhere does the Act require the use of only one type of test to the exclusion of other non-discriminatory tests. A test which measures the level of general intelligence, but is unrelated to the job to be performed is just as reasonably a prerequisite to hiring or promotion as is a high school diploma. In fact, a general intelligence test is probably more accurate and uniform in application than is the high school education requirement.

The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available. Rather, they are intended to indicate whether the employee has the general intelligence and overall mechanical comprehension of the average high school graduate, regardless of race, color, religion, sex, or national origin. The evidence establishes that the tests were professionally developed to perform this function and therefore are in compliance with the Act.

The Act does not deny an employer the right to determine the qualities, skills, and abilities required of his employees. But the Act does restrict the employer to the use of tests which are professionally developed to indicate the existence of the desired qualities and which do not discriminate on the basis of race, color, religion, sex or national origin.

The defendant's expert testified that the Wonderlic Test was professionally developed to measure general intelligence, i.e., one's ability to understand, to think, to use good



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judgment. The Bennett Test was developed to measure mechanical understanding of the operation of simple machines. These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees. The Act does not deprive him of the right to use a test which accurately, reliably, and validly measures the existence of those qualities in an applicant for initial employment or for promotion.

Plaintiffs lastly contend that the defendant discriminates on the basis of race in the allocation of overtime work at its Dan River Station.

Overtime work at Dan River is referred to as "scheduled overtime" or "emergency overtime." Every employee at the station is allotted eight hours of "scheduled overtime" every four weeks. All other overtime is "emergency overtime."

Between July 2, 1965, and February, 1967, employees in the coal-handling department worked approximately 10.39 per cent of their total working hours in overtime. The percentage of overtime worked by employees in other departments was as follows: maintenance, 7.84 per cent; operations, 5.39 per cent; labor, 5.22 per cent; and other, 5.19 per cent. The high percentage of overtime worked by employees in coal handling was due to erratic deliveries of coal and the difficulty in handling frozen coal during winter months. As a general rule, overtime work is done by the employees of the department which would ordinarily do the work. But occasionally in coal handling, the work load becomes so great that employees from other departments are called in to help. The gist of plaintiffs' contention is that Negroes are denied overtime work in coal-handling and so are discriminated against in the allo-

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cation of overtime. The evidence does not support this contention.

The percentages of overtime worked in each department, with the exception of coal-handling, are very similar. The higher percentage in the maintenance department appears to have been due to overtime work in repairing equipment and not in overtime in the coal-handling operations. Further, the evidence is that Negroes in the labor department assigned to work in coal-handling do not work the same overtime as employees in the coal-handling department because of the danger involved in doing their work at night while the coal-handling operations are going on.

It is concluded that the difference between allocation of overtime to employees is not the result of discriminatory practices and is not in violation of the Act.

**CONCLUSIONS OF LAW**

1. This Court has jurisdiction over the parties and subject matter of this action, pursuant to the provisions of Section 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. By order of this Court dated June 19, 1967, this action was permitted to be maintained as a class action, but the order was made conditional in nature pursuant to the Federal Rules of Civil Procedure 23(c) (1). The order defined the class plaintiffs sought to represent as all Negroes presently employed, all Negroes who may subsequently be employed, and all Negroes who may hereafter seek employment at the defendant's Dan River Steam Station in Draper, North Carolina.

3. The Court is of the opinion, finds, and concludes that the defendant's high school education requirement does not

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violate Title VII of the Act. It has a legitimate business purpose and is equally applicable to both Negro and white employees similarly situated.

4. The tests in use by the defendant at its Dan River Station are professionally developed ability tests within the meaning of Section 703(h) of the Act and are not administered, scored, designed, intended, or used to discriminate because of race or color.

5. Title VII of the Civil Rights Act of 1964 became effective July 2, 1965. The legislative history of the Act clearly shows that it is prospective and not retroactive in effect. Since the effective date of the Act, the defendant has not limited, classified, segregated, or discriminated against its employees in any way which has deprived or tended to deprive them of any employment opportunities because of race or color.

6. The defendant has not discriminated in the allocation of overtime on the basis of race or color and is not in violation of the Act.

7. The plaintiffs have failed to carry the burden of proving that the defendant has intentionally discriminated against them on the basis of race or color. There are no legally established facts from which the Court could draw an inference that the defendant has so discriminated.

Accordingly, no relief is appropriate, and a judgment dismissing the complaint will be entered. Within ten (10) days of this date, counsel for the defendant will submit a proposed judgment, first submitting same to counsel for the plaintiffs for approval as to form.

**Opinion of the United States Court of Appeals**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
No. 13,013**

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**WILLIE S. GRIGGS, et al.,**

*Plaintiff-Appellant,*

**versus**

**DUKE POWER COMPANY,**

*Defendant-Appellee.*

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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**(January 9, 1970)**

**Before**

**SOBELOFF, BOREMAN, and BRYAN,**

**Circuit Judges.**

**BOREMAN, Circuit Judge:**

Present Negro employees of the Dan River Steam Station of Duke Power Company in Draper, North Carolina, in a class action with the class defined as themselves and those Negro employees who subsequently may be employed at the Dan River Steam Station and all Negroes who may hereafter seek employment at the station, appeal from a judgment of the district court dismissing their complaint brought under Title VII of the Civil Rights Act of 1964.

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(Duke Power Company will be referred to sometimes as Duke or the company.) The plaintiffs challenge the validity of the company's promotion and transfer system, which involves the use of general intelligence and mechanical ability tests, alleging racial discrimination and denial of equal opportunity to advance into jobs classified above the menial laborer category.

Duke is a corporation engaged in the generation, transmission and distribution of electric power to the general public in North Carolina and South Carolina. At the time this action was instituted, Duke had 95 employees at its Dan River Station, fourteen of whom were Negroes, thirteen of whom are plaintiffs in this action. The work force at Dan River is divided for operational purposes into five main departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. The positions of Watchman, Clerk and Storekeeper are in a miscellaneous category.

The employees in the Operations Department are responsible for the operation of the station's generating equipment, such as boilers, turbines, auxiliary and control equipment, and the electrical substation. They handle also interconnections between the station, the company's power system, and the systems of other power companies.

The Maintenance Department is responsible for maintenance of all the mechanical and electrical equipment and machinery in the plant.

Technicians working in the Laboratory Department analyze water to determine its fitness for use in the boilers and run analyses of coal samples to ascertain the quality of the coal for use as fuel in the power station. Test Department personnel are responsible for the performance of the station by maintaining the accuracy of instruments, gauges and control devices.

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Employees in the Coal Handling Department unload, weigh, sample, crush, and transport coal received from the mines. In so doing, they operate diesel and electrical equipment, bulldozers, conveyor belts, crushers and other heavy equipment items. They must be able to read and understand manuals relating to such machinery and equipment.

The Labor Department provides service to all other departments and is responsible generally for the janitorial services in the plant. Its employees mix mortar, collect garbage, help construct forms, clean bolts, and provide the necessary labor involved in performing other miscellaneous jobs. The Labor Department is the lowest paid, with a maximum wage of \$1.565 per hour, which is less than the minimum of \$1.705 per hour paid to any other employee in the plant. Maximum wages paid to employees in other departments range from \$3.18 per hour to \$3.65 per hour.

Within each department specialized job classifications exist, and these classifications constitute a line of progression for purposes of employee advancement. Promotions within departments are made at Dan River as vacancies occur. Normally, the senior man in the classification directly below that in which the vacancy occurs will be promoted, if qualified to perform the job. Training for promotions within departments is not formalized, as employees are given on-the-job training within departments. In transferring from one department to another, an employee usually goes in at the entry level; however, at Dan River an employee is potentially able to move into another department above the entry level, depending on his qualifications.

In 1955, approximately nine years prior to the passage of the Civil Rights Act of 1964 and some eleven years prior

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to the institution of this action, Duke Power initiated a new policy as to hiring and advancement; a high school education or its equivalent was thenceforth required for all new employees, except as to those in the Labor Department. The new policy also required an incumbent employee to have a high school education or its equivalent before he could be considered for advancement from the Labor Department or the position of Watchman into Coal Handling, Operations or Maintenance or for advancement from Coal Handling into Operations or Maintenance. The company claims that this policy was instituted because it realized that its business was becoming more complex and that there were some employees who were unable to adjust to the increasingly more complicated work requirements and thus unable to advance through the company's lines of progression.

The company subsequently amended its promotion and transfer requirements by providing that an employee who was on the company payroll prior to September 1, 1965, and who did not have a high school education or its equivalent, could become eligible for transfer or promotion from Coal Handling, Watchman or Labor positions into Operating, Maintenance or other higher classified jobs by taking and passing two tests, known as the Wonderlic general intelligence test and the Bennett Mechanical AA general mechanical test, with scores equivalent to those achieved by an average high school graduate. The company admits that this change was made in response to requests from employees in Coal Handling for a means of escape from that department but the same opportunity was also provided for employees in the Labor Department.

Until 1966, no Negro had ever held a position at Dan River in any department other than the Labor Department. On August 6, 1966, more than a year after July 2,

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1965, the effective date of the Civil Rights Act of 1964, the first Negro was promoted out of the Labor Department, as Jesse C. Martin (who had a high school education) was advanced into Coal Handling. He was subsequently promoted to utility operator on March 18, 1968. H. E. Martin, a Negro with a high school education, was promoted to Watchman on March 19, 1968, and subsequently to the position of Learner in Coal Handling. Another Negro, R. A. Jumper, was promoted to Watchman and then to Trainee for Test Assistant on May 7, 1968. These three were the only Negroes employed at Dan River who had high school educations. Recently, another Negro, Willie Boyd, completed a course which is recognized and accepted as equivalent to a high school education; thereby he became eligible for advancement under current company policies. Insufficient time has elapsed in which to determine whether or not Boyd will be advanced without discrimination, but it does appear that the company is not now discriminating in its promotion and transfer policies against Negro employees who have a high school education or its equivalent.

The plaintiff Negro employees admit that at the present time Duke has apparently abandoned its policy of restricting all Negroes to the Labor Department; but the plaintiffs complain that the educational and testing requirements preserve and continue the effects of Duke's past racial discrimination, thereby violating the Civil Rights Act of 1964.<sup>1</sup>

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<sup>1</sup> Pertinent sections of Title VII of the Civil Rights Act of 1964 are:

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect



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The district court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Negroes were relegated to the Labor Department and deprived of access to other departments by reason of racial discrimination practiced by the company. This finding is fully supported by the evidence.

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to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000e-2(h):

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice.)

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However, the district court also held that Title VII of the Civil Rights Act of 1964 does not encompass the present and continuing effects of past discrimination. This holding is in conflict with other persuasive authority and is disapproved. While it is true that the Act was intended to have prospective application only, relief may be granted to remedy present and continuing effects of past discrimination. *Local 53 v. Vogler*, 407 F.2d 1047, 1052 (5 Cir. 1969); *United States v. Local 189*, 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd*, No. 25956, — F.2d. — (5 Cir. 1969); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 516 (E.D. Va. 1968). See, *United States v. Hayes International Corporation*, No. 26809, — F.2d — (5 Cir. 1969), 38 L.W. 2149 (Sept. 16, 1969). In *Quarles*, it was directly held that present and continuing consequences of past discrimination are covered by the Act, the court stating, "It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles v. Philip Morris, Inc.*, *supra* at 516. The *Quarles* decision was expressly approved and followed in *United States v. Local 189*, *supra*, as the district court, with subsequent approval of the Fifth Circuit Court of Appeals, struck down a seniority system which had the effect of perpetuating discrimination. "... [W]here, as here, 'job seniority' operates to continue the effects of past discrimination, it must be replaced \* \* \*." *United States v. Local 189*, *supra* at 45. In *Local 53 v. Vogler*, 407 F.2d 1047, 1052 (5 Cir. 1969), the court said: "Where necessary to ensure compliance with the Act, the District Court was fully empowered to eliminate the present effects of past discrimination."

Those six Negro employee-plaintiffs without a high school education or its equivalent who were discrimina-

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torily hired only into the Labor Department prior to Duke's institution of the educational requirement in 1955 were simply locked into the Labor Department by the adoption of this requirement. Yet, on the other hand, many white employees who likewise did not have a high school education or its equivalent had already been hired into the better departments and were free to remain there and be promoted or transferred into better, higher paying positions. Thus, it is clear that those six plaintiff Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief; the educational requirement shall not be invoked as an absolute bar to advancement, but must be waived as to these plaintiffs and they shall be entitled to nondiscriminatory consideration for advancement to other departments if and when job openings occur.

Likewise, as to these same six Negro plaintiffs, the testing requirements established in 1965 are also discriminatory. The testing requirements, as will be fully explained later in this opinion, were established as an approximate equivalent to a high school education for advancement purposes. Since the adoption of the high school education requirement was discriminatory as to these six Negro employees and the tests are used as an approximate equivalent for advancement purposes, it must follow that the testing requirements were likewise discriminatory as to them. These six plaintiffs had to pass these tests in order to escape from the Labor Department while their white counterparts, many of whom also did not have a high school education, had been hired into departments other than the Labor Department and therefore were not required to take the tests. Therefore, as to these six plaintiffs, the testing requirements must also be waived and shall not be invoked as a bar to their advancement.

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Next, we consider the rights of the second group of plaintiffs, those four Negro employees without a high school education or its equivalent who were hired into the Labor Department after the institution of the educational requirement. We find that they are not entitled to relief for the reasons to be hereinafter assigned. In determining the rights of this second group of plaintiffs, it is necessary to analyze and determine the validity of Duke's educational and testing requirements under the Civil Rights Act of 1964. We have found no cases directly in point. The Negro employee-plaintiffs contend that the requirements continue the effects of past discrimination and, therefore, must be struck down as invalid under the Act. We find ourselves unable to agree with that contention.

Plaintiffs claim that Duke's educational and testing requirements are discriminatory and invalid because: (1) there is no evidence showing a business need for the requirements; (2) Duke Power did not conduct any studies to discern whether or not such requirements were related to an employee's ability to perform his duties; and (3) the tests were not job-related, and § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), requires tests to be job-related in order to be valid.

The company admits that it initiated the requirements without making formal studies as to the relationship or bearing such requirements would have upon its employees' ability to perform their duties. But, Duke claims that the policy was instituted because its business was becoming more complex, it had employees who were unable to grasp situations, to read, to reason, and who did not have an intelligence level high enough to enable them to progress upward through the company's line of advancement.

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Pointing out that it uses an intracompany promotion system to train its own employees for supervisory positions inside the company rather than hire supervisory personnel from outside, Duke claims that it initiated the high school education requirement, at least partially, so that it would have some reasonable assurance that its employees could advance into supervisory positions; further, that its educational and testing requirements are valid because they have a legitimate business purpose, and because the tests are professionally developed ability tests, as sanctioned under § 703(h) of the Act, 42 U.S.C. 2000e-2(h).

In examining the validity of the educational and testing requirements, we must determine whether Duke had a valid business purpose in adopting such requirements or whether the company merely used the requirements to discriminate. The plaintiffs claim that centuries of cultural and educational discrimination have placed Negroes at a disadvantage in competing with whites for positions which involve an educational or testing standard and that Duke merely seized upon such requirements as a means of discrimination without a business purpose in mind. Plaintiffs have admitted in their brief that an employer is permitted to establish educational or testing requirements which fulfill genuine business needs and that such requirements are valid under the Act. In support of this statement, we quote verbatim from appellants' brief:

*"An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. For example, an employer may require a fair typing test of applicants for secretarial positions. It may well be that, because of long-standing inequality in educational and cultural opportunities available to Negroes, proportionately fewer Negro applicants than*

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*white can pass such a test. But where business need can be shown, as it can where typing ability is necessary for performance as a secretary, the fact that the test tends to exclude more Negroes than whites does not make it discriminatory. We do not wish even to suggest that employers are required by law to compensate for centuries of discrimination by hiring Negro applicants who are incapable of doing the job. But when a test or educational requirement is not shown to be based on business need, as in the instant case, it measures not ability to do a job but rather the extent to which persons have acquired educational and cultural background which has been denied to Negroes."* (Emphasis added.)

Thus, plaintiffs would apparently concede that if Duke adopted its educational and testing requirements with a genuine business purpose and without intent to discriminate against future Negro employees, such requirements would not be invalidated merely because of Negroes' cultural and educational disadvantages due to past discrimination. Although earlier in this opinion we upheld the district court's finding that the company had engaged in discriminatory hiring practices prior to the Act and we concluded also that the educational and testing requirements adopted by the company continued the effects of this prior discrimination as to employees who had been hired prior to the adoption of educational requirement, it seems reasonably clear that this requirement did have a genuine business purpose and that the company initiated the policy with no intention to discriminate against Negro employees who might be hired after the adoption of the educational requirement.

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This conclusion would appear to be not merely supported, but actually compelled, by the following facts:

(1) Duke had long ago established the practice of training its own employees for supervisory positions rather than bring in supervisory personnel from outside.<sup>2</sup>

(2) Duke instituted its educational requirement in 1955, nine years prior to the passage of the Civil Rights Act of 1964 and well before the civil rights movement had gathered enough momentum to indicate the inevitability of the passage of such an act.<sup>3</sup>

(3) Duke has, by plaintiffs' own admission, discontinued the use of discriminatory tactics in employment, promotions and transfers.<sup>4</sup>

(4) The company's expert witness, Dr. Moffie, testified that he had observed the Dan River operation; had observed personnel in the performance of jobs; had studied the written summary of job duties; had spent several days with company representatives discussing job content; and he concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications. This testimony is uncontroverted in the record.

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<sup>2</sup> The company had an obvious business motive and objective in establishing the high school requirement, that is, hiring only personnel who had a reasonable expectation of ascending promotional ladders into supervisory positions thereby eliminating road blocks which would interfere with movement to higher classifications and tend to decrease efficiency and morale throughout the entire work force.

<sup>3</sup> It is highly improbable that the company seized upon such a requirement merely for the purpose of continuing discrimination.

<sup>4</sup> This tends to demonstrate the company's good faith.



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(5) When the educational requirement was adopted it adversely affected the advancement and transfer of white employees who were Watchmen or were in the Coal Handling Department as well as Negro employees in the Labor Department.<sup>5</sup>

(6) Duke has a policy of paying the major portion of the expenses incurred by an employee who secures a high school education or its equivalent. In fact, one of the plaintiffs recently obtained such equivalent, the company paying seventy-five percent of the cost.<sup>6</sup>

Next, we consider the testing requirements to determine their validity and we conclude that they, too, are valid under § 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). In pertinent part, § 703(h) reads: "• • • nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin."

There is no evidence in the record that there is any discrimination in the administration and scoring of the tests. Nor is there any evidence that the tests are not professionally developed. The company's expert, Dr. D. J. Moffie, testified that in his opinion the tests were professionally developed and are reliable and valid; that they are "low

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<sup>5</sup> It is unreasonable to charge the company with prospective discrimination by instituting an educational requirement which was to be applied prospectively to white, as well as Negro, employees.

<sup>6</sup> It would be illogical to conclude that Duke established the educational requirement for purposes of discrimination when it was willing to pay for the education of incumbent Negro employees who could thus become eligible for advancement.



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level" tests and are given at Dan River by one who has had special training in the administration of such tests. The minimum acceptable scores used by the company are approximately those achieved by the average high school graduate, which fact indicates that the tests are accepted as a substitute for a high school education. The evidence disclosed that the minimum acceptable scores used by Duke are Wonderlic-20, and Bennett Mechanical-39; the score of the average high school graduate, i.e., the fiftieth percentile, is 21.9 for the Wonderlic, nearly two points higher than the score accepted by Duke, and 39 for the Bennett Mechanical.

The plaintiffs claim that tests must be *job-related* in order to be valid under § 703(h). The Equal Employment Opportunity Commission which is charged with administering and implementing the Act supports plaintiffs' view. The EEOC has ruled that tests are unlawful " \* \* \* in the absence of evidence that the tests are properly related to specific jobs and have been properly validated \* \* \* ." *Decision of EEOC*, December 2, 1966, reprinted in CCH, *Employment Practices Guide*, ¶17,304.53. The EEOC's position has been supported by two federal district courts. *United States v. H. K. Porter*, 59 L.C. ¶9204 (M.D. Ala. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968). In *Dobbins* the court invalidated a test which was being given for membership in a labor union or in connection with a referral system because it was not adequately related to job performance needs. However, in that case it was clear that the testing requirement was not one of business necessity and the reasons for adopting such a requirement compellingly indicated that the purpose of such requirement was discrimination, which is not true in the present case.

The court below held that the tests given by Duke were not job-related, but then refused to give weight to the

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EEOC ruling that tests must be job-related in order to be valid under § 703(h). The plaintiffs assert that such refusal was error. It has been held that the interpretation given a statute by an agency which was established to administer the statute is entitled to great weight. *Udall v. Tallman*, 380 U.S. 1, 15 (1965). This principle has been applied to EEOC interpretations given the Civil Rights Act of 1964. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5 Cir. 1969); *Cox v. United States Gypsum Co.*, 284 F. Supp. 74, 78 (N.D. Ind. 1968); *International Chemical Workers Union v. Planters Manufacturing Co.*, 259 F. Supp. 365, 366 (N.D. Miss. 1966). Plaintiffs cite these cases last mentioned above to support their argument that this court should adopt the EEOC ruling that tests must be job-related in order to be valid. However, none of these cases stands for the proposition that an EEOC interpretation is binding upon the courts; in fact, in *International Chemical Workers*, *supra* at 366, it was held that such interpretations of the EEOC are " \* \* \* not conclusive on the courts \* \* \*." We cannot agree with plaintiffs' contention that such an interpretation by EEOC should be upheld where, as here, it is clearly contrary to compelling legislative history and, as will be shown, the legislative history of § 703(h) will not support the view that a "professionally developed ability test" *must* be job-related.

The amendment which incorporated the testing provision of § 703(h) was proposed in modified form by Senator Tower, who was concerned about a then-recent finding by a hearing examiner for the Illinois Fair Employment Practices Commission in a case involving Motorola, Inc. The examiner had found that a pre-employment general intelligence test which Motorola had given to a Negro applicant for a job had denied the applicant an equal employment

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opportunity because Negroes were a culturally deprived or disadvantaged group. In proposing his original amendment, essentially the same as the version later unanimously accepted by the Senate, Senator Tower stated:

"It [the amendment which, in substance, became the ability testing provision of § 703(h)] is an effort to protect the system whereby employers give *general ability and intelligence tests to determine the trainability of prospective employees*. The amendment arises from my concern about what happened in the Motorola FEPC case \* \* \*.

"Let me say, only, in view of the finding in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of Title VII, might attempt to regulate the use of tests by employers \* \* \*.

*"If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person to do a job."* (Emphasis added.) 110 Congressional Record 13492, June 11, 1964.

The discussion which ensued among members of the Senate reveals that proponents and opponents of the Act agreed that general intelligence and ability tests, if fairly administered and acted upon, were not invalidated by the Civil Rights Act of 1964. *See*, 110 Congressional Record 13503-13505, June 11, 1964.

The "Clark-Case" interpretative memorandum pertaining to Title VII fortifies the conclusion that Congress did

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not intend to invalidate an employer's use of bona fide general intelligence and ability tests. It was stated in said memorandum:

"There is no requirement in Title VII that employers abandon bona fide qualification tests *where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups*. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." (Emphasis added.) 110 Congressional Record 7213, April 8, 1964.

When Senator Tower called up his modified amendment, which became the ability testing provision of §703(h), Senator Humphrey—one of the leading proponents and the principal floor leader of the fight for passage of the entire Act—stated:

"I think it should be noted that the Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and found it to be in accord with the intent and purpose of that title.

"I do not think there is any need for a rollcall. We can expedite it. *The Senator has won his point.*

"I concur in the amendment and ask for its adoption." (Emphasis added.) 110 Congressional Record 13724, June 13, 1964.

At no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill re-

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quired by a specific job or group of jobs. In fact, the legislative history would seem to indicate clearly that Congress was actually trying to guard against such a result. An amendment requiring a "direct relation" between the test and a "particular position" was proposed in May 1968,<sup>7</sup> but was defeated. We agree with the district court that a test does not have to be job-related in order to be valid under § 703(h).<sup>8</sup>

Having determined that Duke's educational and testing requirements were valid under Title VII, we reach the conclusion that those four Negro employees without a high school education who were hired after the adoption of the educational requirement are not entitled to relief. These employees were hired subject to the educational requirement; each accepted a position in the Labor Department with his eyes wide open. Under this valid educational requirement these four plaintiffs could have been hired only in the Labor Department and could not have been promoted or advanced into any other department, irrespective of race, since they could not meet the requirement. Consequently, it could not be said that they have been discriminated against. Furthermore, since the testing requirement is being applied to white and Negro employees alike

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<sup>7</sup> Senate Report No. 1111, May 8, 1968.

<sup>8</sup> This decision is not to be construed as holding that *any* educational or testing requirement adopted by *any* employer is valid under the Civil Rights Act of 1964. There must be a genuine business purpose in establishing such requirements and they cannot be designed or used to further the practice of racial discrimination. Future cases must be decided on the bases of their own fact situations in light of pertinent considerations such as the company's past hiring and advancement policies, the time of the adoption of the requirements, testimony of experts and other evidence as to the business purpose to be accomplished, and the company's stated reasons for instituting such policies.

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as an approximate equivalent to a high school education for advancement purposes, neither is it racially discriminatory.

Once we have determined that certain of the plaintiffs are entitled to relief the next question for consideration is the nature and extent of relief to be provided.<sup>9</sup> Those six Negro employees without a high school education or its equivalent who were hired prior to the initiation of the educational requirement are entitled to injunctive relief under § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).<sup>10</sup> The educational and test requirements are

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<sup>9</sup> The plaintiffs disclaim any request for or entitlement to relief other than by way of injunction. Had there been an issue as to monetary awards for damages to those plaintiffs found to have been the victims of racial discrimination, there would have been presented the further issue as to the date of applicability of the Act. There were only 95 employees at the Dan River plant when the Act became effective on July 2, 1965, but Duke Power Company then employed some 6,000 persons throughout its entire system. The Act was initially applicable to employers with 100 or more employees, and it did not become applicable to employers with 75 to 100 employees until July 2, 1966. However, since the relief requested and awarded is solely injunctive in nature no question as to the applicability date of the Act is presented for decision.

<sup>10</sup> Section 706(g) of the Civil Rights Act of 1964 limits injunctive relief to situations in which an employer or a union has "intentionally engaged in or is intentionally engaging in" an unlawful employment practice. While we have found Duke's educational and testing requirements valid as to employees hired subsequently to the adoption of the educational requirement, we further conclude that Duke had intentionally engaged in discriminatory hiring practices in earlier years long prior to the enactment of the Civil Rights Act of 1964 and that, as to those six Negro employees hired prior to the adoption of the educational requirement, the effects of this discrimination were continued. Thus, these six plaintiffs may be granted appropriate injunctive relief under § 706(g). See, *Clark v. American Marine Corp.*, No. 16315, — F. Supp. — (E.D. La. Sept. 15, 1969); *Local 189 v. United States*, No. 25956, — F.2d — (5 Cir. July 28, 1969).

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invalid as applied to their eligibility for transfer and promotion. Thus, on remand, the district court should award proper injunctive relief to insure that these six employees are considered for any future openings without being subject to the educational or testing requirements. This will work no hardship upon the company since the relief provided will simply require it to consider those Negro employees equally with similarly situated white employees, many of whom do not have a high school education or its equivalent. If a Negro employee is advanced to a job in one of the better departments and his inability to perform the duties of the job is demonstrated after a reasonable period the company will be justified in returning him to his previous position or placing him elsewhere. As Judge Butzner said in *Quarles*, 279 F.Supp. 505, 521 (E.D. Va. 1968), *supra*:

"If any transferee fails to perform adequately within a reasonable time \* \* \* he may be removed and returned to the department and job classification from which he came, or to another higher job classification for which the company may believe him fitted."

In granting relief, the district court should order that seniority rights of the six Negro employees who are victims of discrimination be considered on a plant-wide, rather than a departmental, basis. To apply strict departmental seniority would result in the continuation of present effects of past discrimination whenever one of the six is considered in the future for advancement to a vacant job in competition with a white employee who has already gained departmental seniority in a better department as a result of past discriminatory hiring practices. In *United States*



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v. *Local 189*, 282 F.Supp. 39, 44 (E.D. La. 1968), *aff'd*, No. 25956, — F.2d — (5 Cir. 1969), *supra*, the court held:

“Where a seniority system has the effect of perpetrating discrimination, and concentrating or ‘telescoping’ the effect of past discrimination against Negro employees into the *present* placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system.”<sup>11</sup>

It is to be understood and remembered that there are thirteen named Negro plaintiffs who bring this action. Jesse C. Martin, a Negro formerly employed in the Labor Department who had a high school education, was advanced to a higher position subsequent to the effective date of the Act. He is not joined as a plaintiff since the past discrimination against him has been removed. This case is now moot as to two of the named Negro plaintiffs who have high school educations and have been advanced; also as to Willie Boyd, who has acquired the equivalent of a high school education and is now eligible for advancement.

Briefly summarizing, only those six Negro employees without a high school education or its equivalent who were hired prior to the adoption of the educational requirement are entitled to relief. As to them the judgment below is reversed and the case is remanded to the district court

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<sup>11</sup> Here, despite the company's representations to the contrary, it is apparent that strict departmental seniority is not always followed since the company admits that an employee sometimes enters a new department at a position *above* the entry level; however, it is the more general practice for an employee to enter a new department at the lowest classification therein.



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with directions to fashion appropriate injunctive relief consistent with this opinion. As to the remaining Negro plaintiffs the judgment below is affirmed.

Affirmed in part,  
reversed in part,  
and remanded.

SOBELOFF, Circuit Judge, concurring in part and  
dissenting in part:

The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years. For that reason and because the prevailing opinion puts this circuit in direct conflict with the Fifth,<sup>1</sup> I find it appropriate to set forth my views in some detail.

While I concur in the grant of relief to six of the plaintiffs, I dissent from the majority opinion insofar as it upholds the Company's educational and testing requirements and denies relief to four Negro employees on that basis.

The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified.<sup>2</sup> This is not the first time the federal courts of our circuit have been exposed to this problem. In what has become a leading case, Judge Butzner of our court, sitting

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<sup>1</sup> Local 189 v. United States, — F.2d —, 71 LRRM 3070, 3081 (5th Cir., July 28, 1969), discussed at note 8, *infra*.

<sup>2</sup> See generally Cooper and Sobel, Seniority and Testing Under Fair Employment Laws, A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598 (June 1969) [hereinafter cited as Cooper and Sobel]; Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Col. L. Rev. 691 (April 1968).

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as a district judge by designation, authoritatively dealt with the question of the denial of jobs to blacks because of a seniority system built upon a pattern of past discrimination. *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). Today we are faced with an analogous issue, namely, the denial of jobs to Negroes who cannot meet educational requirements or pass standardized tests, but who quite possibly have the ability to perform the jobs in question. On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.

The pattern of racial discrimination in employment parallels that which we have witnessed in other areas. Overt bias, when prohibited, has oftentimes been supplanted by more cunning devices designed to impart the appearance of neutrality, but to operate with the same invidious effect as before. Illustrative is the use of the Grandfather Clause in voter registration—a scheme that was condemned by the Supreme Court without dissent over a half century ago. *Guinn v. United States*, 238 U.S. 347 (1915).<sup>3</sup> Another illustration is the resort to pupil transfer plans to nullify rezoning which would otherwise serve to desegregate school districts. Again, the illusory even-handedness did not shield the artifice from attack; the Supreme Court unanimously repudiated the plan. *Goss v. Bd. of Education*, 373 U.S. 683 (1963). It is long recognized constitutional doctrine that “sophisticated as well as simple-minded modes of discrimination” are prohibited. *Lane v. Wilson*, 307 U.S.

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<sup>3</sup> The opinion was unanimous save for Mr. Justice McReynolds, who took no part in the consideration or decision of the case.

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268, 275 (1938) (Frankfurter, J.). We should approach enforcement of the Civil Rights Act in the same spirit.<sup>4</sup>

In 1964 Congress sought to equalize employment opportunity in the private sector. Title VII, § 703(a) of the 1964 Civil Rights Act provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

The statute is unambiguous. Overt racial discrimination in hiring and promotion is banned. So too, the statute interdicts practices that are fair in form but discriminatory in substance. Thus it has become well settled that "objective" or "neutral" standards that favor whites but do not serve business needs are indubitably unlawful employ-

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<sup>4</sup> It is not part of my contention that the defendant in the present case availed himself of "objective" employment procedures deliberately to evade the strictures of Title II. As will be developed, an employer's state of mind when he adopts the standards is irrelevant when the effect of his actions is not different from purposeful discrimination. At any rate, it is my view that the majority's construction of Title VII will invite many employers to seize on such measures as tools for their forbidden designs.

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ment practices. The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end. *Quarles v. Philip Morris, supra*; *Local 189 v. United States*, — F.2d —, 71 LRRM 3070 (5th Cir. July 28, 1969); *Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). For example, a requirement that all applicants for employment shall have attended a particular type of school would seem racially neutral. But what if it develops that the specified schools were open only to whites, and if, moreover, they taught nothing of particular significance to the employer's needs? No one can doubt that the requirement would be invalid. It is the position of the Equal Employment Opportunities Commission (EEOC) that educational or test requirements which are irrelevant to job qualifications and which put blacks at a disadvantage are similarly forbidden.

I

*Use of Non-Job-Related  
Educational and Testing Standards*

The Dan River plant of the Duke Power Company is organized into five departments: (1) Operations; (2) Maintenance; (3) Laboratory and Test; (4) Coal Handling; and (5) Labor. There is also a miscellaneous category which includes watchmen. Until 1965 blacks were routinely relegated to the all-Negro Labor Department as part of a policy of overt discrimination.

The era of outrightly acknowledged bias at Duke Power is admittedly at an end. However, plaintiffs contend that administration of certain "objective" transfer criteria have accomplished substantially the same result. It was not until August 1966 that any Negro was promoted out of the Labor Department. Altogether, as of this date, three blacks

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have advanced from that department. They were the only ones that could measure up to the Company's requisites for transfer.<sup>5</sup>

In 1955 the Company first imposed its educational requirement: a high school diploma (or successful completion of equivalency ["GED"] tests) would be necessary to progress from any of the outside departments (Labor, Coal Handling, Watchmen) to any of the inside departments (Operations, Maintenance, Laboratory and Test) or from Labor to the two other outside classifications. In 1965 the Company provided that in lieu of a high school diploma or equivalent, employees could satisfy the transfer standards by passing two "general intelligence" tests, the 12 minute "Wonderlic" test and the 30 minute "Bennett Mechanical AA" test. It is uncontroverted that all of these requirements are equivalent.

*A. The Necessity for Job-Relatedness*

Whites fare overwhelmingly better than blacks on all the criteria,<sup>6</sup> as evidenced by the relatively small promotion

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<sup>5</sup> At oral argument we were told that one other black has since qualified but has not yet been transferred.

<sup>6</sup> No one seriously questions the fact that, in general, whites register far better on the Company's alternative requirements than blacks. The reasons are not mysterious.

*High School Education.* In North Carolina, census statistics show, as of 1960, while 34% of white males had completed high school, only 12% of Negro males had done so. On a gross level, then, use of the high school diploma requirement would favor whites by a ratio of approximately 3 to 1.

*Standardized Tests.* It is generally known that standardized aptitude tests are designed to predict future ability by testing a cumulation of acquired knowledge.

In other words, an aptitude test is necessarily measuring a student's background, his environment. It is a test of his

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rate from the Labor Department since 1965. Therefore, the EEOC contends that use of the standards as conditions for transfer, unless they have significant relation to performance on the job, is improper. The requirements, to withstand attack, must be shown to appraise accurately those characteristics (and only those) necessary for the job or jobs an employee will be expected to perform. In others, the standards must be "job-related."

Plaintiffs and the Commission are not asking, as the majority implies, that blacks be accorded favored treatment in order to remedy centuries of past discrimination. That many members of the long disfavored group find themselves ill equipped for certain employments is a burden which the 1964 Civil Rights Act does not seek to lift. The argument is only that educational and cultural differences caused by that history of deprivation may not be fastened on as a test for employment when they are irrelevant to the issue of whether the job can be adequately performed.

Duke Power, on the other hand, maintains that its selection standards are unimpeachable since in its view the

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cumulative experiences in his home, his community and his school.

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, — F.2d — (D.C. Cir. 1969) (en banc).

Since for generations blacks have been afforded inadequate educational opportunities and have been culturally segregated from white society, it is no more surprising that their performance on "intelligence" tests is significantly different than whites' than it is that fewer blacks have high school diplomas. In one instance, for example, it was found that 58% of whites could pass a battery of standardized tests, as compared with only 6% of the blacks. Included among those tests were the Wonderlic and Bennett tests. Decision of EEOC, cited in CCH Empl. Prac. Guide ¶1209.25 (Dec. 2, 1966).

For a comprehensive analysis of the impact of standardized tests on blacks, see Cooper and Sobel, 1638-1641.

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tests (and therefore also the equivalent educational standard) are protected by § 703(h) of Title VII.

Section 703(h) provides, in pertinent part:

• • • nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.  
42 U.S.C. § 2000e-2(h).

The Company asserts that its tests are "professionally developed ability tests" and thus do not have to be job-related. The District Court agreed and rejected the construction put upon § 703(h) by the EEOC. The majority here adopts this view.

In its *Guidelines on Employment Testing Procedures*<sup>7</sup> the Commission has held that a test can be a "professionally developed ability test" only if it

fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.<sup>7a</sup>

<sup>7</sup> Issued September 21, 1966. The *Guidelines* may be found in CCH Empl. Prac. Guide ¶16,904 at 7319.

<sup>7a</sup> The newly appointed chairman of the EEOC, William H. Brown, III, has recently reaffirmed this thesis. In an address on November 26, 1969 he asked representatives of more than forty

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In rejecting the Commission *Guidelines* the District Court erred and the majority repeats the error. Under settled doctrine the Commission's interpretation should be accepted. The Supreme Court has held that

[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153. See also, e.g., *Gray v. Powell*, 314 U.S. 402; *Universal Battery Co. v. United States*, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408.

*Udall v. Tallman*, 380 U.S. 1, 16 (1965). In the *Tallman* case, the Court found that a construction of an Executive Order made by the Secretary of the Interior was not unreasonable. Accordingly, it followed the Secretary's interpretation.

*Guidelines* of the EEOC are entitled to similar consideration. The Fifth Circuit agrees. In *Weeks v. Southern Bell*

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trade associations to "review selection and testing procedures to make sure they reflect actual job requirements." 72 LRR 413, 416 (12/8/69).



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*Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir., 1969), that court, in deciding a Title VII sex discrimination case, accorded "considerable weight" to the EEOC guideline which construed the relevant statutory provision. In a more recent case the same court noted the rejection of the EEOC's position by the lower court in the present case and specifically disapproved of the decision here under review.<sup>8</sup> *Local 189 v. United States*, — F.2d —, 71 LRRM 3070, 3081 (July 28, 1969). We should do the same.

Other courts have reached similar results. Granting relief from the effects of a departmental and seniority structure, Judge Butzner found in *Quarles* that "[t]he restrictions do not result from lack of merit or qualification." 279 F. Supp. at 513. The Eighth Circuit has held that "it is essential that journeyman's examinations be objective in nature, that they be designed to test the ability of the applicant to do that work usually required by a journeyman . . ." *United States v. Local 36, Sheet Metal Workers*, — F.2d — (8th Cir. Sept. 16, 1969). *Accord, Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968).

Not only is the Commission's interpretation of § 703(h) not unreasonable, but it makes eminent common sense. The Company would have us hold that any test authored by

<sup>8</sup> Judge Wisdom stated that

[The *Griggs* court] went on to strike down an EEOC interpretation of that provision which would limit the exemption to tests that measure ability "required by the particular job or class of jobs which the applicant seeks." . . .

When an employer adopts a system that necessarily carries forward the incidents of discrimination into the present, his practice constitutes ongoing discrimination, unless the incidents are limited to those that safety and efficiency require. That appears to be the premise for the Commission's interpretation of § 703(h). To the extent that *Griggs* departs from that view, we find it unpersuasive.

71 LRRM at 3081.

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a professional test designer is "professionally developed" and automatically merits the court's blessing. But, what is professionally developed for one purpose is not necessarily so for another. A professionally developed typing test, for example, could not be considered professionally developed to test teachers. Similarly, a test that is adequately designed to determine academic ability, such as a college entrance examination, may be grossly wide of the mark when used in hiring a machine operator. Moreover, the Commission's is the only construction compatible with the purpose to end discrimination and to give effect to § 703(a). Although certainly not so intended, my brethren's resolution of the issue contains a built-in invitation to evade the mandate of the statute. To continue his discriminatory practices an employer need only choose any test that favors whites and is irrelevant to actual job qualifications. In this very case, the Company's oft-reiterated but totally unsubstantiated claim of business need has been deemed sufficient to sustain its employment standards. The record furnishes no supporting evidence, only the defendant's *ipse dixit*.

It would be enough to rest our decision on the reasonableness of the EEOC's position. A deeper look, however, at the legislative history of § 703(h) provides powerful additional support for its construction.

Congressional discussion of employment testing came in the swath of the famous decisions of an Illinois Fair Employment Practices Commission hearing examiner, *Myart v. Motorola*.<sup>9</sup> That case went to the extreme of suggesting that standardized tests on which whites performed better than Negroes could never be used. The decision was

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<sup>9</sup> Decided on February 26, 1964. Reproduced in 110 Cong. Rec. 5662-64 (1964).

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generally taken to mean that such tests could never be justified *even if the needs of the business required them*.

Understandably, there was an outcry in Congress that Title VII might produce a *Motorola* decision. Senators Clark and Case moved to counter that speculation. In their interpretive memorandum they announced that

[t]here is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.<sup>10</sup>

Read against the context of the *Motorola* controversy, the import of the Clark-Case statement plainly appears: employers were not to be prohibited from using tests that determine *qualifications*. "Qualification" implies qualification *for* something. A reasonable interpretation of what the Senators meant, in light of the events, was that nothing in the Act prevents employers from requiring that applicants be fit for the job. Tests for that purpose may be as difficult as an employer may desire.

Senator Tower, however, was not satisfied that a *Motorola* decision was beyond the purview of Title VII as written. He introduced an amendment which had the object of preventing the feared result. His amendment provided that a test, administered to all applicants without regard to race, would be permissible "if \* \* \* in the case of any

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<sup>10</sup> 110 Cong. Rec. 7213 (1964).

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individual who is an employee of such employer, such test is designed to determine or predict whether such individual is *suitable or trainable with respect to his employment* [or promotion or transfer] *in the particular business or enterprise involved \* \* \** [Emphasis added.]<sup>11</sup> It was emphatically represented by the author that the amendment was "not an effort to weaken the bill"<sup>12</sup> and "would not legalize discriminatory tests"<sup>13</sup> but was offered to stave off an apprehended *Motorola* ruling that might "invalidate tests \* \* \* to determine the professional competence or ability or trainability or suitability of a person *to do a job.*" (Emphasis added.)<sup>14</sup> It is highly noteworthy that

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<sup>11</sup> The amendment was introduced on July 11, 1964. In its entirety it reads:

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—

(1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or

(2) in the case of an individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin.

110 Cong. Rec. 13492 (1964).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 13504.

<sup>14</sup> *Id.* at 13492.

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Senator Tower's exertions were not on behalf of tests unrelated to job qualifications, but his aim was to make sure that job-related tests would be permitted. He squarely disavowed any broader aim.

Senators Case and Humphrey opposed the amendment as redundant.<sup>15</sup> Reiterating the message of the Clark-Case memorandum, Senator Case declared that "[t]he Motorola case could not happen under the bill the Senate is now considering."<sup>16</sup> Senator Case also feared that some of the language in the amendment would be susceptible to misinterpretation.<sup>17</sup> The amendment was defeated.<sup>18</sup>

Two days later Senator Tower offered § 703(h) in its present form, stating that it had been agreed to in principle "[b]ut the language was not drawn as carefully as it should have been."<sup>19</sup> The new amendment was acceptable to the proponents of the bill and it passed.<sup>20</sup>

What does this history denote? It reveals that because of the *Motorola* case there was serious concern that tests that select for job qualifications—job-related tests—might be deemed invalid under Title VII. Senators Clark, Case and Humphrey thought the fear illusory, but Senator Tower

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<sup>15</sup> *Id.* at 13503-04.

<sup>16</sup> *Id.* at 13503.

<sup>17</sup> In fact, it appears that Senator Case was concerned that the amendment might be construed the way Duke Power would have us construe the enacted § 703(h).

If this amendment were enacted it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, whether it was a good test or not, so long as it was professionally designed.

*Id.* at 13504.

<sup>18</sup> *Id.* at 13505.

<sup>19</sup> *Id.* at 13724.

<sup>20</sup> *Id.*

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expended great effort to insure against the possibility. At the same time he gave assurance that he did not mean to weaken the Act. His first proposed amendment contained language which contemplated that tests were to be job-related. According to his own formulation tests had to be of such character as to determine whether "an individual is suitable with respect to his employment." At no time was there a clash of opinion over this principle but the amendment was opposed by proponents of the bill for other reasons and was rejected. The final amendment, which was acceptable to all sides could hardly have required less of a job relation than the first.<sup>21</sup> Since job-relatedness was never in dispute there is no room for the inference that the bill in its enacted form embodied a compromise on this point. The conclusion is inescapable that the Commission's construction of § 703(h) is well supported by the legislative history.<sup>22</sup>

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<sup>21</sup> Indeed, the avowed tightening of language by Senator Tower in the interim, n.19, *supra*, was presumably in response to the misgiving expressed by Senator Case that the original amendment could lend itself to the construction that Duke Power now seeks. See n.15, *supra*.

<sup>22</sup> The majority argues that congressional action some years after the passage of the 1964 Act supports the Company's position. This is not legislative history. Even if the import of the action were unequivocal it would not speak for the will of the 88th Congress which passed the statute.

The cited legislative deliberation was occasioned by a bill introduced in May 1968 to modify Title VII. See S. 3465, 90th Cong., 2d Sess. § 6(c) (1968). If adopted it would have amended § 703(h) to embody a job-related standard in express terms. However, the bill was not enacted. One can draw differing and inconsistent conclusions from these events. It could be argued, as the majority does, that the bill's proponents recognized that § 703(h) as it stands does not contemplate job-relation. It is equally possible that the bill ultimately did not pass because the amendment was thought to be unnecessary. The bill's adherents might also have thought that the new amendment would represent no change,

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Manifestly, then, so far as Duke Power relies on § 703(h) for the proposition that its tests (or other requirements) need not be job-related, it must fail.

*B. The District Court's Findings and the Evidence Supporting It.*

There can be no serious question that Duke Power's criteria are not job-related. The District Court expressly found that they were not,<sup>23</sup> and that finding is the only one consistent with the evidence.

To insure that a criterion is suitably fitted to a job or jobs, an employer is called upon to demonstrate that the standard was adopted after sufficient study and evaluation. It is not enough that officials think or hope that a requirement will work. In the District Court, Dr. Richard Barrett

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but offered it to forestall employers, such as Duke Power, from construing § 703(h) incorrectly. The inferences to be drawn from the introduction of the bill and its death are at best ambiguous and inconclusive.

If one must look to subsequent events for elucidation, consideration might be given to the comment of a Senator who was intimately involved in the passage of § 703(h). Senator Humphrey has stated that in his view § 703(h) did not protect tests if they were "irrelevant to the actual job requirements." Letter to American Psychological Association, quoted in *The Ind. Psychologist* (Div. 14, Am. Psychological Ass'n Newsletter), August, 1965, at 6, cited in Cooper and Sobel, 1653, n.67.

<sup>23</sup> The District Judge said:

The two tests used by the defendant were never intended to accurately measure the ability of an employee to perform the particular job available.

\* \* \*

\* \* \* These qualities are general in nature and are not indicative of a person's ability to perform a particular task. Nevertheless, they are qualities which the defendant would logically want to find in his employees.

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was qualified as an expert witness for plaintiff on the "use of tests and other selection procedures for selection in promotion and employment." He testified as to what sound business practice would dictate: First, a careful job analysis should be made, detailing the tasks involved in a job and the precise skills that are necessary. Then, on the basis of this analysis, selection procedures may be chosen that are adapted to the relevant abilities. Then, the most important step is to validate the chosen procedures, that is, to test their results with actual performance.

The EEOC concurs. The *Guidelines* detail methods to be used to develop, study, and validate employment criteria.<sup>24</sup>

Compare with the above what Duke Power has done and what it has failed to do. Company officials say that the high school requirement was adopted because they thought it would be helpful. Indeed, a company executive candidly admitted that

there is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt this was a reasonable requirement

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Duke Power offered the testimony of Dr. Dannie Moffie, an expert "psychologist in the field of industrial and per-

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<sup>24</sup> The recommended methods were adopted after study by a panel of psychologists. The Commission has the power "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public[.]" 42 U.S.C. 2000e-4(f)(5).

Also see 33 Fed. Reg. 14392 (1968). By order of the Secretary of Labor, detailed minimum standards of evidence of test validity have been issued for federal contractors. That evidence is reviewed by the Office of Federal Contract Compliance to determine whether or not a contractor has violated Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.), banning racial discrimination.



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sonnel testing." Dr. Moffie agreed that a professionally developed test "should be reliable and \* \* \* should be valid." The question of validity, he said, is whether "the test measures what it has been set up to measure." Dr. Moffie never asserted that the Bennett and Wonderlic tests had been validated for job-relatedness. In fact, he testified that a job-related validity study was begun at the Dan River plant in 1966 but has not yet been completed. What this expert did claim was that the tests had been validated for their express purpose of determining "whether or not a person has the intelligence level and the mechanical ability level that is characteristic of the High School graduate. According to Dr. Moffie,

when [the tests] function as a substitute or in lieu of a High School education, then, the assumption is that the test then,—the High School education is the kind of training and ability and judgment that a person needs to have, in order to do the jobs that we are talking about here \* \* \*.

It is precisely this assumption that is totally unsubstantiated. The tests stand, and fall, with the high school requirement. The testimony does establish that the tests are the equivalent or a suitable substitute for a high school education, but there is an utter failure to establish that they sufficiently measure the capacity of the employee to perform any of the jobs in the inside departments. This is a fatal omission and should mark the end of the story.

*C. The Alleged Business Justification*

But on the majority's theory, there can be business justification in the absence of job-relatedness. The Company's promotion policy has always been to give on-the-job

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training—the next senior man is promoted if, after he tries out on the job, he is found qualified. The Company claims that ten years before the start of this suit it found that, its business having become increasingly complex, employees in the advanced departments “did not have an intelligence level high enough to enable them to progress” in the ordinary line of promotion. It is asserted that in order to ameliorate this situation and to “upgrade the quality of its work force” the Company adopted the high school requirement, and later the alternative tests, as conditions for entry into the desirable inside departments. On these claims the majority grounds its determination of business need.

In fairness to the majority and to the Company, the thrust of this factual presentation is to suggest an argument that does not necessarily disavow job-relatedness. Rather, the rule would be that the jobs for which the tests must be fitted may be jobs that employees will *eventually, rather than immediately*, be expected to fill. However, the plaintiffs and the Commission have neither addressed nor rejected that proposition. Rather, it is their contention, supported by the testing and finding below, that Duke Power has not shown that its educational and testing requirements are related to *any* job.<sup>25</sup>

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<sup>25</sup> The notion that future jobs can be the basis for a test is not inconsistent with the language of the *Guidelines* which speaks of “the applicant’s ability to perform a particular job or class of jobs.” Of course it would be impermissible for an employer to gear his requirements to jobs the availability of which is only a remote possibility. The office of Federal Contract Compliance administers Executive Order 11,246, 3 C.F.R. 339 (1964-65 comp.) which bans discrimination by government contractors. That agency has recognized this problem and has provided (by order of the Secretary of Labor) that when a hiring test is based on possible promotion to other jobs, promotion must be probable “within a

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Distilled to its essence, the underpinning upon which my brethren posit their argument is their expressed belief in the good faith of Duke Power. For them, the crucial inquiry is not whether the Company can establish business need, but whether it has a bad motive or has designed its tests with the conscious purpose to discriminate against blacks. Thus the majority stresses that the standards were adopted in 1955 when overt discrimination was the general rule, and hence the new policy was obviously not meant to accomplish that end. But this is no answer.

A man who is turned down for a job does not care whether it was because the employer did not like his skin color or because, although the employer professed impartiality, procedures were used which had the effect of discriminating against the applicant's race. Likewise irrelevant to Title VII is the state of mind of an employer whose policy, in practice, effects discrimination. The law will not tolerate unnecessarily harsh treatment of Negroes even though an employer does not plan this result. The use of criteria that are not backed by valid and corroborated business needs cannot be allowed, regardless of subjective intent. There can be no legitimate business purpose apart from business need; and where no business need is shown, claims to business purpose evaporate.<sup>26</sup>

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reasonable period of time and in a great majority of cases." 33 Fed. Reg. 14392, § 2(b)(1) (1968).

In this case, however, the issue is not the propriety of testing for remote positions. We might assume that once an employee joins the line of progression his advance will be inexorable. Nevertheless, the fact remains that Duke Power's requirements have never been validated for jobs at the end of the ladder, let alone those on the bottom rung.

<sup>26</sup> As I have noted from the outset of this discussion, the ultimate question under Title VII is whether there are business needs for

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It may be accepted as true that Duke Power did not develop its transfer procedures in order to evade Title VII, since in 1955 this enactment could not be foreseen. However, by continuing to utilize them at the present time, it is now evading the Act. And by countenancing the practice, this court opens the door to wholesale evasion. We may be sure that there will be many who will seek to pass through that door.

The Company's claim to business justification is further attenuated by imbalance in the application of the standards. Even if we view the standards as oriented toward future jobs, the fact remains that of those that might apply for such positions in the inside partments, only the outsiders must meet the questioned criteria in order to qualify. Intra-departmental progression remains the same. Also there is apparently no restriction on transfer from any of the inside departments to the other two inside departments. An employee with no more than a fifth grade education who has not taken the tests may try out for new inside jobs and transfer to a vacancy in another department if he is already in an inside department. In spite of Duke Power's vaunted faith in the necessity of a high school education or its equivalent, such an employee may,

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an employer's policy. Plaintiffs agree and the majority properly quotes their brief, adding emphasis:

An employer is, of course, permitted to set educational or test requirements that fulfill genuine business needs. \* \* \* [W]here business needs can be shown \* \* \* the fact that the test tends to exclude more Negroes than whites does not make it discriminatory.

The statement is correct and certainly does not "concede," as the majority urges, that the question is only whether Duke Power had a "genuine business purpose and [was] without intent to discriminate against future Negro employees \* \* \*."

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without any test, advance as far as his actual talents permit and qualify for higher pay.

The fact that Duke Power has not consistently relied on its standards, especially when viewed in light of the fact that the exempted inside group was constituted when racial discrimination was in vogue, belies the claim to business justification.

In short, Duke Power has not demonstrated how the exigencies of its business warrant its transfer standards. The realities of the Duke Power experience reveal that what the majority seizes upon as business need is in fact no more than the Company's bald assertion. The majority opinion's measure of "genuine business purpose" must be very low indeed, for, after all is said and done, Duke Power has offered no reason for allowing it to continue its racially discriminatory procedures.

## II

*Discriminatory Application of Standards*

As described above, the Company's criteria unfairly apply only to outsiders seeking entrance to the inside departments. This policy disadvantages those who were not favored with the lax criteria used for whites before 1955. As I will show, this when juxtaposed with the history and racial composition of the Dan River plant, is itself sufficient to constitute a violation of Title VII.

It is true, as the majority points out, that the uneven-handed administration of transfer procedures works against some whites as well as blacks. It is also true that unlike the Constitution, Title VII does not prohibit arbitrary classifications generally. Its focus is on racial and other specified types of discrimination. Thus, when an employer

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capriciously favors the inside employees, to the detriment of those employed in the outside departments, this is not automatically an unlawful employment practice if whites as well as blacks are in the disadvantaged class.

On the other hand, it cannot be ignored that while this practice does not constitute forthright racial discrimination, the policy disfavoring the outside employees has primary impact on blacks. This effect is possible only because a history of overt bias caused the departments to become so imbalanced in the first place. The result is that in 1969, four years after the passage of Title VII, Dan River looks substantially like it did before 1965. The Labor Department is all black; the rest is virtually lily-white.

There no longer is room for doubt that a neutral superstructure built upon racial patterns that were discriminatorily erected in the past comes within the Title VII ban. Judge Butzner put the point to rest when he rejected an employer contention that "the present consequences of past discrimination are outside the coverage of the act." In his words, "[i]t is apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act." *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 515-16 (E.D. Va. 1968).

A remedy for this kind of wrong is not without precedent. The "freezing" principle (more properly, the anti-freezing principle), developed by the Fifth Circuit in voting cases is analogous. In those cases a pattern and practice of discrimination excluded almost all eligible Negroes from the voting lists but enrolled the vast majority of whites. Faced with judicial attack, the authorities found that they could no longer avowedly employ discriminatory practices. They invented and put into effect instead new,

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unquestionably even-handed, but onerous voting requirements which had the effect of excluding new applicants of both races, but, as was to be expected, primarily affected Negroes, who in the main were the unlisted ones. As the Fifth Circuit explained the principle,

[t]he term "freezing" is used in two senses. It may be said that when illegal discrimination or other practices have worked inequality on a class of citizens and the court puts an end to such a practice but a new and more onerous standard is adopted before the disadvantaged class may enjoy their rights, already fully enjoyed by the rest of the citizens, this amounts to "freezing" the privileged status for those who acquired it during the period of discrimination and "freezing out" the group discriminated against.

*United States v. Duke*, 332 F.2d 759, 768 (5th Cir. 1964). Accordingly, the new voting requirements were struck down. This remedial measure was approved by the Supreme Court in *United States v. Louisiana*, 380 U.S. 145 (1965).

Applying similar reasoning to the Title VII employment context, the Fifth Circuit invalidated the nepotism policy of an all-white union, which restricted new members to relatives of old ones. Although the policy of course discriminated against whites as well as others, it was prohibited since it enshrined the white membership and effectively forever denied membership status to Negroes or Mexican-Americans. *Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969).<sup>27</sup>

<sup>27</sup> See also *Houston Maritime Ass'n*, 168 NLRB 83, 66 LRRM 1337 (1967). A union, after having consistently rejected Negroes for membership, adopted a new "freeze" policy whereby all new

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Title VII bars "freeze-outs" as well as pure discrimination, where the "freeze" is achieved by requirements that are arbitrary and have no real business justification. Thus Duke Power's discrimination against *all* those who did not benefit from the pre-1955 rule for whites operates as an illegal "freeze-out" of blacks from the inside departments.

## III

*Conclusion*

Beside the violation found by the majority, Duke Power is guilty of an unlawful employment practice in two other ways. First, it has used non-job-related transfer standards which have the effect of excluding blacks. Second, it has implemented those same standards in a discriminatory fashion so as to freeze blacks out of the inside departments.

This case deals with no mere abstract legal question. It confronts us with one of the most vexing problems touching racial justice and tests the integrity and credibility of the legislative and judicial process. We should approach our task of enforcing Title VII with full realization of what is at stake.

For all of the above reasons, the judgment of the District Court should be reversed with directions to grant relief to all of the plaintiffs.

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applicants were turned down, white and black. The Labor Board found that the union violated the National Labor Relations Act.

[B]y adopting a practice which in operative effect created a preferred class in employment, the result was that the Union's previous policy of discrimination against Negroes as to job opportunities solely on the basis of race was continued and maintained.



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**MAY 7 1970**

**JOHN F. DAVIS, CLERK**

**IN THE  
Supreme Court of the United States**

**OCTOBER TERM, 1969**

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**No. ~~1495~~ 124**

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**WILLIE S. GRIGGS, et al.,**

*Petitioners*

**v.**

**DUKE POWER COMPANY, a Corporation,**

*Respondent*

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**On Petition For Writ of Certiorari To the United  
States Court of Appeals For The Fourth  
Circuit**

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**BRIEF FOR RESPONDENT  
IN OPPOSITION**

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**George W. Ferguson, Jr.**

**Carl Horn, Jr.**

**William I. Ward, Jr.**

**Power Building**

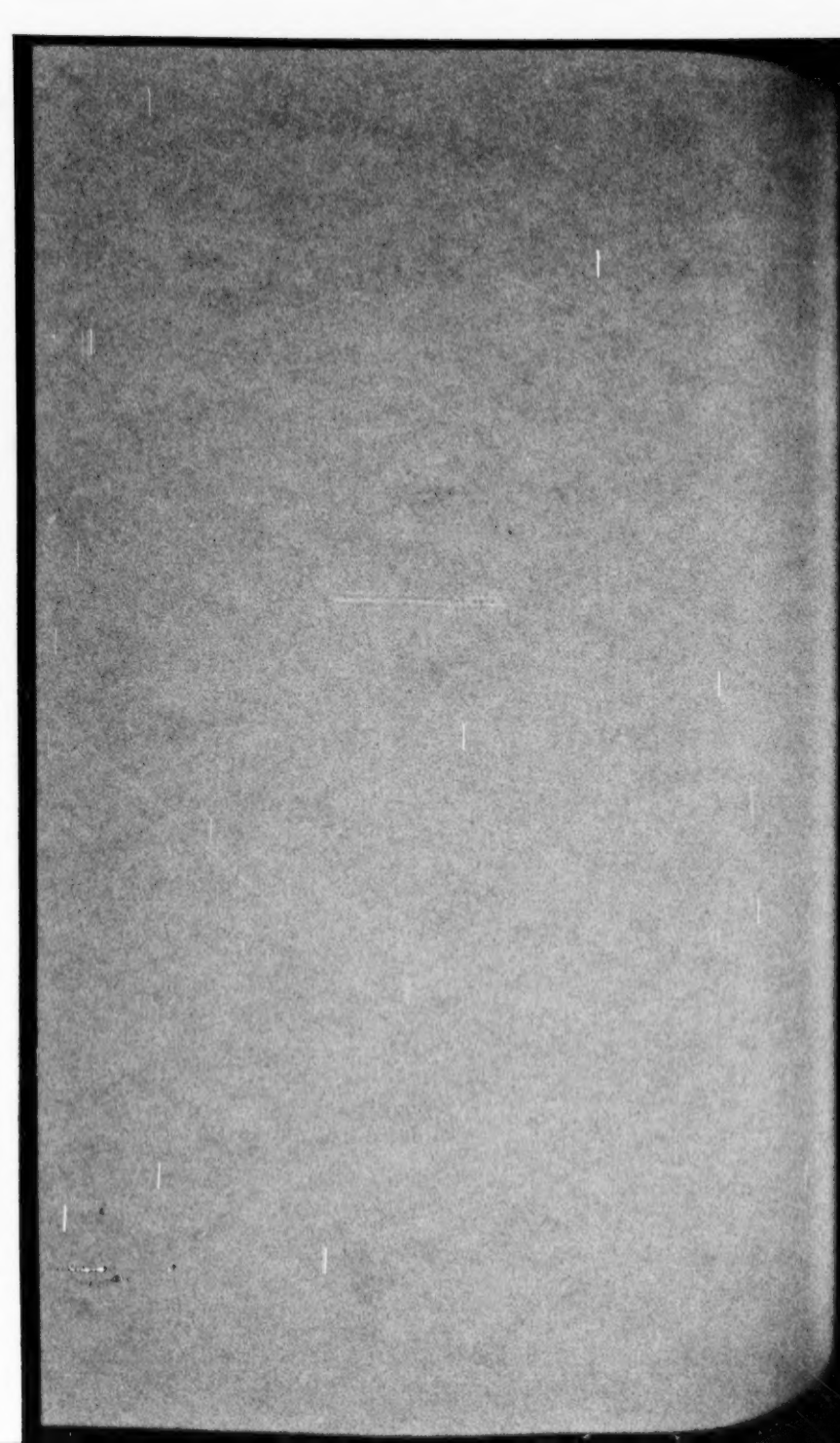
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**Charlotte, North Carolina**

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IN THE  
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No. 1405

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On Petition For Writ of Certiorari To the United  
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**BRIEF FOR RESPONDENT  
IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 420 F. 2d 1255 (1970). The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). Both are reported in the Appendix to the Petition. (Pet. App.)

**JURISDICTION**

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 9, 1970. The Petition for Writ of Certiorari (Pet.) was filed on April 9, 1970,

jurisdiction of this Court being invoked under 28 U.S.C. §1254(1).

### STATEMENT OF THE CASE

In addition to the facts stated in the Petition, Respondent deems the following as material to the consideration of the questions presented.

The certified evidence of record (R) shows that the employees in the Operating Department at the Dan River Station are responsible for the safe, efficient, and reliable operation of the generating equipment at the station. They operate the boilers, the turbines, the auxiliary and control equipment, the electrical substation and the interconnections between the station, the Duke Power system, and the systems of other power companies. The Maintenance Department is responsible for maintenance of all the mechanical and electrical equipment and machinery in the plant. The employees in the Coal Handling Department weigh, sample, unload, crush, and transport coal received from the mines. In so doing they operate diesel and electric equipment, bulldozers, crushers, heavy machinery, conveyor belts, travelling trippers and other equipment. They must be able to read and understand manuals relating to such complex machinery and equipment in order to progress in this department.

In addition there are service departments such as a Laboratory Department where technicians analyze boiler water to keep it pure enough for use and a Test Department where technicians are responsible for the performance of the power station by maintaining the accuracy of instruments, gauges, and control devices.

In the test, laboratory and clerical groups, the skills required generally relate to intelligence and not man-

ual or mechanical skills. In operations, maintenance and coal handling a general intelligence level and mechanical comprehension are required to progress within those departments.

At least 10 years prior to institution of this action, the Company realized that its business was becoming more complex and that it had employees who were unable to read, to reason, and in general did not have an intelligence level high enough to enable them to progress in the Operations, Maintenance and Coal Handling Departments. (R. pp. 20b-21b) In an effort to upgrade the quality of its workforce, the Company placed into effect the requirement that an employee had to have a high school education or its equivalent (such as a Certificate of Completion or General Education Development (GED) tests, High School Level) to be considered for transfer from the Catchman classification into operations and coal handling. The same requirement was applicable to those in coal handling who desired to transfer into operations and maintenance. The Company realized that the high school requirement was not perfect, but believed it would give the Company a chance to obtain employees who were capable of operating and generating equipment in an industry which was rapidly developing new technology. The Company uses employees to form nuclei of employees at existing plants. In this case was tried, the Company at new plants. At the time computers on order for its generating plants; and it was making plans for placing into operation its first nuclear generating plant. (R. pp. 21b)

84a-87a, 92a, 93a, 20b,



The Company subsequently amended its promotion-transfer requirements by providing that an employee who was on the Company payroll prior to September 1, 1965, and who did not have a high school education or its GED equivalent could become eligible for consideration for promotion or transfer to a department containing higher classified jobs by passing a general intelligence test (Wonderlic) and a general mechanical test (Bennett Mechanical AA) with scores equal to the norms of the average high school graduate. (R. pp. 86a-88a, 137b) This change was made in response to requests from employees in coal handling and was designed to include, rather than exclude, for consideration for promotion those employees, including the plaintiffs, who were employed prior to September 1, 1965. (R. pp. 199a, 200a, 21b) Those employees without a high school education who did not desire to qualify for consideration for transfer or promotion to a higher classified department by taking the tests could take advantage of the Company's Tuition Refund Plan in order to obtain a high school education. (R. pp. 90a, 91a, 21b).

#### **QUESTIONS PRESENTED**

Whether the use of a high school educational requirement is an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964; and whether it is an unlawful practice under the Act (in lieu of said educational requirement) to require incumbent employees without a high school education to take and pass a general intelligence test and a mechanical ability test with the score of the average high school graduate prior to entering the higher skilled lines of progression where the evidence of record conclusively shows and the trial court found:

1. That the tests were "professionally developed ability tests" within the meaning of section 703(h) of the Act; and

2. That the Company had legitimate business reasons for establishing said requirements because it was necessary to have the general intelligence level and over-all mechanical comprehension of a high school graduate to enter and progress in the higher skilled lines of progression and said tests measure such qualifications.

## ARGUMENT

### I

THE COURT BELOW PROPERLY CONCLUDED THAT RESPONDENT'S EDUCATIONAL AND TESTING REQUIREMENTS WERE LAWFUL, NON-DISCRIMINATORY EMPLOYMENT CRITERIA UNDER TITLE VII, SECTIONS 703 (a), (h), & (g), OF THE CIVIL RIGHTS ACT OF 1964, AND THE COMPANY HAD LEGITIMATE BUSINESS REASONS FOR ESTABLISHING SAID CRITERIA.

Petitioners cite four District Court cases as authority for the proposition that tests and educational requirements which are not job-related are unlawful under Title VII of the Civil Rights Act of 1964 (hereinafter referred to as the "Act"). *Arrington v. Massachusetts Bay Transportation Authority*, 61 Lab. Cases 9375, 2 FEP Cases 371 (D. C. Mass. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S. D. Ohio 1968); *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40 (N. D. Ala. 1968), appeal noticed 5th Cir. No. 27703; *Penn v. Stumpf*, 62 Lab. Cases 9404, 2 FEP Cases 391 (D. C. N. Calif. 1970). In each instance, their claim is unfounded.

Insofar as Respondent can determine there has been no judicial determination that the use of educational requirements constitutes an unlawful employment practice under Title VII of the Act. In *Dobbins* as well as in *Porter*, *Arrington*, and *Penn*, the District Court was dealing with *tests, not educational requirements*.

The legislative history clearly shows that discrimination based on educational qualifications does not violate Title VII of the Act. The interpretative memorandum submitted jointly by Senators Clark and Case, two of the Act's leading sponsors, stated:

"With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by Section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. *Any other criterion or qualification for employment is not affected by this Title.*" 110 Cong. Rec. 6692; Bureau of National Affairs Operations Manual, The Civil Rights Act of 1964, p. 329 (Emphasis added).

During the Senate debate on June 9, 1964, Senator Humphrey said: "The Employer will outline the qualifications to be met for the job. The employer, not the Government, will establish the standards." 110 Cong. Rec. 13088. Respondent submits that Congress has made it clear that an employer can set his qualifica-

tions, educational or otherwise, as high as he likes without violating Section 703 of Title VII of the Act so long as they are applied without discrimination.

On October 2, 1965, the General Counsel of the Equal Employment Opportunity Commission (EEOC) issued an interpretation stating that discrimination based on educational qualifications does *not* violate Title VII of the Act (R. p. 147b). Petitioners cite a subsequent decision of the EEOC on December 6, 1966, (issued almost two months *after* the Complaint was filed in this case) as holding that unless educational requirements are related to job performance they violate Title VII of the Act (Pet. p. 10—f.n. 8) *Educational requirements were not under consideration in that case*. The only thing *decided* by the EEOC was that reasonable cause existed to believe that an employer who owned a food processing plant (where the great majority of jobs required unskilled personnel) was discriminating against Negroes by administering a *test* not related to job requirements.

The Petitioners are unable to cite a single decision to support their contention that educational requirements violate Title VII of the Act unless they are job-related. *A fortiori*, they are unable to cite a decision of the agency charged with administration and enforcement of the Act that so holds.

Petitioners cite *Dobbins, supra* for the proposition that a test is not "professionally developed" unless it is related to job performance. Section 703(h) provides that it is not an unlawful employment practice for an employer to give and act on the results of a "professionally developed ability test". *This section was enacted to provide exemptions for employers only, not labor*

*unions. Dobbins* has to do with tests being given for membership in a labor organization or in connection with a referral system. The question of "professionally developed tests" within the meaning of Section 703(h) was not before the Court in that case. Moreover, as indicated by the Court below, it was clear in that case that the purpose of the tests was to discriminate. (Pet. App. 31a)

In *Porter, supra* the question of job-related tests was not at issue because the Court found that the tests were related to the abilities required for performance of jobs. After stating the thesis of the EEOC guidelines, Judge Allgood said at 296 F. Supp. p. 78:

*"Accepting this interpretation for purposes of analysis, and applying it to the record in this case, the result is that there is not sufficient evidence here from which it could be properly said that the SRA and the USES tests used by the Company do not fairly measure the knowledge or skills required by the jobs."* (Emphasis added)

Even though the Court stated that it agreed in principle that aptitudes measured by a test should be relevant to aptitudes involved in the performance of jobs, Judge Allgood did *not hold* that Section 703(h) required that tests be specifically job-related.

*Arrington, supra* and *Penn, supra* are equally inapposite and clearly distinguishable in that the action was brought under the Civil Rights Acts of 1870 and 1871 and a *governmental agency* was the employer in both cases. Neither *Penn* nor *Arrington* would support Petitioner's contention that Section 703(h) requires that tests used by *private* employers must be related to specific jobs.

Here again, Petitioners are unable to point to a single case that supports the position they take with respect to tests. As observed by the Court below, there are no cases directly in point. (Pet. App. 26a)

The majority decision below concisely and succinctly reviews the legislative history of Section 703(h) of Title VII. The decision of the EEOC that tests *must* be related to a particular job or group of jobs and properly validated is clearly contrary to the legislative history of Section 703(h) as the Court below correctly concluded. (Pet. App. 30a-35a) The Court's conclusion is fortified by the fact that in May 1968 an amendment to Section 703(h) requiring a "direct relation" between a test and a "particular position" was proposed and *defeated*. Senate Report No. 1111 on S. 3465, 90th Congress, 2nd Sess. (May 8, 1968) In view of such clearly compelling legislative history, it would have been patent error for the Court to conclude otherwise.

The District Court *found* that in adopting the educational-testing requirements the Respondent had legitimate business reasons and did not intend to discriminate against its Negro employees. The Circuit Court agreed. (Pet. App. 26a-30a) Rule 52(a) of the *Federal Rules of Civil Procedure* provides that the trial court's findings of fact should not be set aside unless they are "clearly erroneous." This Court has held that even though the Appellate Court would construe the facts differently, the trial court's findings cannot be set aside unless they are "clearly erroneous". *United States v. Yellow Cab Co.*, 338 U. S. 338, 341-342, 94 L. Ed. 150, 70 S. Ct. 177 (1949).

More weight than usual should be accorded the opportunity of the trial court to judge the credibility of

Respondent's witness, A. C. Thies, the Company official who prescribed the educational-test requirement for interdepartmental transfer. Whether the Company intended to discriminate against Negro employees had to be determined primarily from the credibility and weight accorded Mr. Thies' testimony by the trial judge. Having had the opportunity to observe Mr. Thies' demeanor and conduct while on the stand, Judge Gordon found:

"More than ten years ago it (Respondent) put into effect a high school education requirement *intended to eventually upgrade the quality of its entire work force*. At least since July 2, 1965, the requirement has been fairly and equally administered."

"The requirement was made applicable to a departmentalized work force *without any intention or design to discriminate against Negro employees*. The departments serve as a reasonable system of classification with each department having a *different function and each department requiring different skills*. (Pet. App. 10a, *Emphasis added*).

When the questions before this Court are concerned with determining the intent of the employer, particular weight should be accorded the trial court's findings. *United States v. Yellow Cab Co.*, *supra*. The Petitioners ask that this Court give them a trial *de novo* on the record and attribute to the Respondent a base motive and sinister intent to discriminate against its Negro employees. To do so would require this Court to attribute a devious purpose to discriminate behind the Respondent efforts to upgrade the quality of the work

force to keep pace with the growing technology in the electric utility industry.

In *United States v. National Association of Real Estate Boards*, 339 U. S. 485, 495-496, 94 L. Ed. 1007, 70 S. Ct. 711 (1950), Mr. Justice Jackson viewed the subject thusly:

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

This is a case wherein Petitioners want this Court to set aside the trial court's findings as being "clearly erroneous", but they are unable to point out any evidentiary basis which would warrant it.

Petitioners contend that where testing and educational requirements are not related to a particular job or group of jobs there can be no business necessity. The other side of the coin is that where a private employer determines that educational and test requirements are necessary to upgrade the quality of its work force so as to safely and efficiently operate his business such requirements are job related, albeit, not related to the particular job or class of jobs to be performed. Once a private employer makes such a determination his business reasons for doing so are legitimately established, absent any showing of an intent to discriminate.

The lower court carefully guards against a broad approval of all educational and testing requirements and restricts its decision solely to the facts of this case.



(Pet. App. p. 35a, f.n. 8) This proceeding was instituted as a class action and the class defined by the District Court (R. p. 19a) was extremely limited; therefore, the rights of only a few litigants are affected by the lower court's decision. Based on the record evidence in this case, the decision of the court below is manifestly correct. In the light of the legislative history of the Act no other result could have been reached. There is, therefore, no important question of federal law requiring decision by this Court.

## II

### THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS INVOLVING TITLE VII OF THE ACT.

The Circuit Court cases<sup>1</sup> cited by Petitioners in this connection hold only that where a *seniority system*, which originated before the effective date of the Act, has the effect of perpetuating discrimination, relief may be granted under the Act to remedy present and continuing effects of past discrimination. The Court below expressly approved the decisions of the Fifth and Eighth Circuits (Pet. App. 24a) and held that in this case the District Court should order that the seniority rights of the six Negro employees granted relief should be considered on a plantwide rather than a departmental basis to remedy the present effects of past discrimination. (Pet. App. 37a) Petitioners seek to set up a conflict by engrafting on the decision of the Fourth Circuit in this case a "fundamental inconsis-

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<sup>1</sup>*United States v. Local 189*, 416 F. 2d 980 (5th Cir. 1969), cert. denied—U.S.—(1970); *United States v. Hayes International Corp.*, 415 F. 2d 1038 (5th Cir. 1969); *United States v. Sheet Metal Workers, Local 36*, 416 F. 2d 123 (8th Cir. 1969).

ency" with the principles established in the seniority context in the Fifth and Eighth Circuits (Pet. p. 14) *while at the same time admitting that no other Court of Appeals has dealt with the issues of testing and educational requirements.* (Pet. p. 15) The Petition, therefore, falls of its own weight.

It should also be noted that more than ten years ago this Court denied certiorari in a case strikingly similar to this. *Whitfield vs. United Steelworkers of America, Local No. 2708*, 263 F. 2d 546, 43 LRRM 2496 (5th Cir. 1959) *cert. denied* 360 U. S. 902, 79 S. Ct. 1285, 3 L. Ed. 2d 1254. Although that case was decided long before enactment of Title VII, the question of *tests* in the context of *business necessity* was before the Court and Respondent submits that it is truly analogous in principle to this case. In *Whitfield* the employer for many years had separate all-Negro and all-white lines of progression. Only the white lines of progression led to skilled jobs. The Company and union entered into an agreement which allowed Negroes to bid for positions in the white line of progression as they became available. *Negroes bidding for jobs in the white lines of progression had to pass a test showing their ability to perform the job. White incumbents did not have to pass the test.* The Court held that the agreement was not a violation of the union's duty to fairly represent all its members.

Referring to *Whitfield*, Judge Butzner said in *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968) at page 518:

"*Whitfield* does not stand for the proposition that present discrimination can be justified simply because it was caused by conditions in the past.

Present discrimination was allowed in *Whitfield* only because it was rooted in the Negro employees' lack of ability and training to take skilled jobs on the same basis as white employees. *The fact that white employees received their skill and training in a discriminatory progression line denied to the Negroes did not outweigh the fact that the Negroes were unskilled and untrained. Business necessity, not racial discrimination, dictated the limited transfer privileges under the contract.*" (Emphasis added)

Respondent respectfully submits that the decision below does not conflict with decisions of other circuits. The issues in this case are uniquely narrow and no amount of strained semantics can convert it into one warranting review by this Court on certiorari.

### III

#### THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER DECISIONS OF THIS COURT.

Petitions try to draw this case into the ambit of civil rights cases heretofore decided by *this Court*. The cases relied on by Petitioners involve the constitutionality of state statutes, not employment practices.

In *Guinn v. United States*, 238 U. S. 347 (1915) the court decided that a state statute was unconstitutional because it deprived citizens of the right to vote secured by the Fifteenth Amendment. Moreover, the petition for certiorari was drawn by the Court below, seeking instructions. *Lane v. Wilson*, 307 U. S. 268 (1938) also held a state statute unconstitutional because it deprived Negroes of the right to vote. *Gaston County*,

*North Carolina v. United States*, 395 U. S. 285 (1969) was a case brought under the Voting Rights Act of 1965; and *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E. D. La. 1967), *aff'd per curiam* 389 U. S. 571 (1968) held unconstitutional a state statute which set up a program of tuition grants to pupils attending private schools because it was designed to maintain segregated schools.

Title VII of the Civil Rights Act deals with *employment practices of private employers*. None of the cases cited by Petitioners in this context are even remotely connected with employment practices. In cases involving voting, schooling, or jury service it can be presumed or assumed that a significant number of the group involved have the necessary qualifications. It cannot be assumed *without evidence* that a significant number of Negroes in the group involved at Dan River have the qualifications to perform jobs in the higher skilled classifications. At least two District Courts agree in principle.<sup>2</sup>

Accordingly, Respondent submits that no questions analogous to the ones presented here have been decided by this Court and there can be no direct conflict.

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<sup>2</sup>*U.S. v. H. K. Porter, supra; Dobbins v. Local 212, IBEW, supra* where Judge Hogan said at page 445: "There is no such thing as an 'Instant Electrician' by Court decree or otherwise." (footnote 15).

**CONCLUSION**

For the foregoing reasons, the Petition for Certiorari should be denied.

*Respectfully submitted,*

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May 5, 1970

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1405

WILLIE S. GRIGGS ET AL., PETITIONERS

v.

DUKE POWER COMPANY

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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18a-62a) is reported at 420 F. 2d 1225. The opinion of the district court (Pet. App. 1a-17a) is reported at 292 F. Supp. 243.

## JURISDICTION

The judgment of the court of appeals was entered on January 9, 1970. The petition for a writ of certiorari was filed on April 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether it is unlawful under Title VII of the Civil Rights Act of 1964 for an employer to require the



completion of high school or the passage of certain general intelligence tests, as a condition of eligibility for employment for, or transfer to, jobs formerly reserved only for white employees, when

- (1) both the high school standard and the substitute tests operate to disqualify Negroes at a substantially higher rate than whites; and
- (2) neither possession of a high school education, nor passage of the substitute tests, has been shown to measure the capacity of employees to perform such jobs.

#### STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*) provides in pertinent part as follows:

Sec. 703(a) It shall be an unlawful employment practice for an employer—

\* \* \* \* \*

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

\* \* \* \* \*

(h) \* \* \* it shall not be an unlawful employment practice for an employer to \* \* \* give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. \* \* \*

**INTRODUCTION AND INTEREST OF THE UNITED STATES**

This brief is submitted in response to an order of this Court, entered on May 25, 1970, inviting the Solicitor General to file a brief in this case expressing the views of the United States.

Federal responsibility for enforcing Title VII of the Civil Rights Act of 1964 is assigned by that Title to the Attorney General and the Equal Employment Opportunity Commission. Pursuant to that statutory mandate, and the provisions of Executive Order 11246 prohibiting employment discrimination by government contractors and subcontractors, the United States is engaged in comprehensive efforts to eliminate racially discriminatory employment practices and to remedy the continuing effects of past discrimination. But the goal of equal employment opportunity remains unrealized; unemployment among Negroes and other minority groups continues to be substantially higher than it is among the population at large,<sup>1</sup> and such unemployment and underemployment continues to be a serious national problem.

The decision of the majority of the court of appeals, if permitted to stand, would give judicial sanction to the use of employment screening devices which do not measure abilities to perform specific jobs but have the effect of seriously limiting employment and promotion opportunities for Negroes and other minority groups. This result would seriously impede the

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<sup>1</sup>For example, in May 1970, unemployment for non-whites was 8%, while that for whites was 4.6%. See Bureau of Labor Statistics, *Employment and Earnings*, June 1970, Table A-3, Major Unemployment Indicators.

government's efforts to achieve equality of employment opportunities.

#### STATEMENT

1. Traditionally, and at least until some five years ago, respondent Duke Power Company discriminated on the basis of race in the hiring and assigning of employees at its Dan River Steam Station in Eden, North Carolina. Negroes were employed only in its Labor Department, where the best jobs paid less than the lowest paying jobs in the four "operating" departments, staffed solely by white personnel. While normally promotions were made within each department on a job seniority basis, there was some mobility between the operating departments. No Negro held a job in a department other than Labor, however, until August 1966, some five months after the filing of charges with the Equal Employment Opportunity Commission. At that time, a Negro employee assigned to the Labor Department was promoted into a formerly white job in the Coal Handling Department.

Beginning in 1956, the Company instituted a policy of requiring a high school education as a prerequisite for initial assignment to any department except Labor and for transfer from the Coal Handling Department or from Watchman to any "inside" department (*i.e.*, Operations, Maintenance or Laboratory and Test Departments). When the Company abandoned its policy of restricting Negroes to employment in the Labor Department, the high school requirement was

also applied to transfers from Labor to any other department.

In July 1965, the Company instituted the additional requirement that new employees register satisfactory scores on two commercially prepared aptitude tests<sup>2</sup> to qualify for assignment to any but the Labor Department. Possession of a high school education alone continued to render incumbent employees eligible for transfer to the four desirable departments. In September of that year, a procedure was instituted whereby incumbent employees who lacked a high school education could qualify for transfer by passing the same two aptitude tests. One of the tests purports to measure general intelligence; the other, general mechanical comprehension. Neither of the tests was intended to measure the ability of an employee to perform any particular job. For both initial hiring and for transfers, the cut-off scores chosen were the national median scores of all high school graduates, making the test standards more stringent than the high school requirement, since the tests would screen out approximately half of all high school graduates.

2. This suit was brought by the thirteen Negro employees of the Labor Department on October 20, 1966, alleging that the testing, transfer, and seniority practices violated the rights of incumbent Negro employees under Title VII of the Civil Rights Act of 1964 by conditioning their eligibility to transfer out of the Labor Department on educational or testing requirements which did not have to be met by white employees pre-

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<sup>2</sup>The tests used at all times relevant to the action were the Wonderlic test and the Bennett Mechanical test.

viously assigned to jobs in the more desirable departments. They further contended that, even if applied by the Company only to Negroes hired after 1956, the high school requirement and the alternative testing requirements were unlawful; by disqualifying Negroes in substantially higher proportions than they did whites, the requirements tended to restrict Negroes to the low paying jobs in the Labor Department, without any business necessity for doing so, thus unlawfully perpetuating the effects of the Company's past discrimination.

Through expert testimony, the plaintiffs attacked the testing requirements on the ground that the Company had not shown that the tests measured capacity to perform the work of any particular job or class of jobs in the plant, or that they predicted success on any job or category of jobs. The testimony of the experts for plaintiffs also tended to show that the testing requirements disqualified Negroes in disproportionate numbers (App. 140a, 147-148a, 154-155a). The Company's expert conceded that the tests were not designed to measure a person's capacity to perform certain jobs, but testified that they were intended merely as a substitute for a high school education "on the assumption that a high school education provides the training, ability and judgment that a person needed to do the jobs in the plant" (App. 181a).

3. The district court found that the Company had followed a policy of overt racial discrimination prior to the adoption of the Act, and agreed that the inequities of the pre-Act racial discrimination were continued by the Company's limitations on transfer

eligibility and department seniority system, but found that, as of the time of trial, the practice of making initial assignments based on race had ceased. The court ruled that, since the application of Title VII was intended to be prospective only, no relief was authorized as to any of the Negro incumbents.

The court of appeals reversed in part, unanimously rejecting the district court's holding that Title VII does not prohibit allegedly neutral practices which perpetuate the effects of past discrimination. The court ruled that Negroes hired and assigned to the Labor Department at a time when there was no high school requirement for entrance to the higher paying departments could not now be made subject to that requirement, since whites hired contemporaneously into the other departments were never subject to such a requirement. As to those Negroes, the court also ruled that their seniority rights be measured on a plant-wide, rather than on a departmental, basis.

With respect to Negroes hired *after* imposition of the high school requirement, however, a majority of the court of appeals affirmed the holding of the district court, finding that the high school requirement had been applied fairly to whites and Negroes alike. The court found that there was no racial purpose or motive <sup>ve</sup> in the adoption of the education requirements, and that in the absence of such a purpose, their use was permitted by Section 703(h) of the Act. The court expressly rejected petitioners' contention that, since both the high school requirement and the tests operated to disqualify proportionately more Negroes than whites, those requirements were unlawful under Title VII ab-

sent a showing that they were, in fact, valid predictors of job success (that is, that they were "job-related"). Judge Sobeloff dissented from this part of the decision, maintaining, as do petitioners in this Court, that Title VII does not protect the use of employment tests which do not measure the skills or abilities necessary to performance of the jobs which the applicants are seeking.

#### ARGUMENT

This case presents the issue whether Title VII of the Civil Rights Act of 1964 permits the use of allegedly objective employment criteria which disqualify disproportionately large numbers of Negro and other minority group persons from employment opportunities for which they are actually or potentially qualified. The issue is one of a high importance, because use of employment criteria of the kind utilized by the Company here is widespread in many parts of the country today. Yet those criteria bear no demonstrated relationship to employees' abilities to perform the jobs for which they are used, and they operate to disqualify Negroes in substantially higher proportions than they do whites. In these circumstances, the use of such criteria needlessly perpetuates the effects of past discrimination, and is, in our view, prohibited by Title VII of the Civil Rights Act of 1964. In holding to the contrary, the court of appeals expressly rejected the interpretation of Title VII adopted by the Equal Employment Opportunity Commission, and refused to follow an Eighth Circuit decision proscrib-

ing the use of tests which do not measure relevant abilities. Review by this Court is appropriate to resolve this important issue.

1. In the nearly five years since Title VII of the Civil Rights Act of 1964 became effective, efforts to enforce that Act through litigation, both by the United States and by aggrieved private individuals, have resulted in nearly unanimous judicial acceptance of the proposition that covert as well as overt, and residual as well as active, discrimination is proscribed by Title VII.

The courts have regularly been confronted with records showing prior racial discrimination by employers or unions and current restrictions and practices which, although arguably serving some identifiable business or economic purpose, were not derived from any compelling business necessity and which, while not inherently discriminatory, tended to perpetuate the discriminatory disadvantages at which Negroes had been placed. In each of these cases, the courts of appeals have ruled that the "neutral practices" involved were unlawful. *Local 189, United Papermakers v. United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Local 53 Asbestos Workers v. Vogler*, 407 F. 2d 1047 (C.A. 5); *United States v. Sheet Metal Workers*, 416 F. 2d 123 (C.A. 8). The district courts have generally reached the same result.<sup>3</sup>

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<sup>3</sup> *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio); *Clark v. American Marine Corporation*, 304 F. Supp. 603 (E.D. La.); *Robinson, et al. v. P. Lorillard Co.* (M.D. N.C.



In our view, the high school education and test requirements used by the Company in this case are legally indistinguishable from the employment, promotion and referral restrictions found unlawful in the cases cited above. Like the apparently neutral restrictions in those cases, imposition of the high school requirement and use of the test alternatives here demonstrably fall far more heavily on Negroes than they do on whites. Nationally, of all non-white males over the age of 25, only ~~12.3~~<sup>19.6</sup> percent have attained 12 years of formal education as compared with ~~24.8~~<sup>4</sup> percent of all white males in the same age group.<sup>4</sup> Necessarily, the imposition of a high school education, or the ability to demonstrate the equivalency of such formal educational attainment on a paper and pencil test, as a condition precedent to consideration for employment or employment advancement, will result in a disproportionately higher percentage of Negroes being excluded.

To be sure, if the possession of a twelfth grade education or its intelligence test score equivalent is shown to be a necessity for satisfactory performance on the jobs for which it is required, the fact that such a requirement eliminates a disproportionately higher percentage of Negroes than it does whites, does not make it an unlawful employment practice. Title VII does not prohibit the use of valid criteria to select

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1970), 62 Lab Cas. ¶ 9423; but see, *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala.), appeal pending, C.A. 5, No. 27,703.

<sup>4</sup> 1960 Census of the Population, Characteristics of the Population, Vol. 1, U.S. Summary, Table 174, p. 1-420.

qualified applicants for particular jobs. On the other hand, if the requirement does not measure the applicant's ability to perform the job in question satisfactorily, then the requirement serves to restrict the employment opportunities of Negroes to the advantage of other applicants without satisfying a demonstrated business need, and is unlawful.

In the case at bar, the respondent acknowledges, and the courts below have found, that the requirement of a high school education or attainment of minimum scores on the tests are not valid predictors of success in performing the jobs involved in this litigation. Unless and until such a showing is made, we think the discriminatory impact of those requirements for promotion and transfer constitutes a classification of employees which would "tend to deprive [Negroes] of employment opportunities" on account of race, in violation of Section 703(a)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)(2)).

2. We turn to the Company's contention, sustained by the court of appeals, that the use of the Wonderlic and Bennett tests as a substitute transfer requirement is specially protected by Section 703(h) of the Act (42 U.S.C. 2000e-2(h)).

Shortly after Title VII of the Civil Rights Act of 1964 became effective, the United States Equal Employment Opportunity Commission interpreted Section 703(h) as protecting only tests which measured the ability to perform the jobs for which they were used, that is, valid and "job-related" tests.<sup>5</sup> Similarly,

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<sup>5</sup>Equal Employment Opportunity Commission, *Guidelines on Employment Testing Procedures*, August 24, 1966, re-

the Eighth Circuit has proscribed under Title VII the use of a journeyman's test which does not measure the ability of the applicant to do the work usually required of journeymen. *United States v. Sheet Metal Workers, supra*, 416 F. 2d at 136. Conceding that the tests in the case at bar were not job related,<sup>6</sup> the majority below rejected the "job-related" standard and concluded instead that in adopting Section 703(h), Congress specifically intended to permit the use of any professionally developed test, so long as there was no discriminatory purpose or motive. We think that reading of Section 703(h) is in error, and that, notwithstanding the majority's disclaimer,<sup>7</sup> it invites the use by employers of a wide and varied array of tests and other qualifying devices which operate unjustly to limit employment opportunities for Negroes as a class.

While the legislative history surrounding the adoption of the Tower amendment is subject to more than one interpretation,<sup>8</sup> the overall congressional intent manifested by the enactment of Title VII compels the view that, where tests tend to perpetuate the effects of past discrimination by disqualifying disproportionately large numbers of Negroes, only those tests which are job related are protected by Section

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printed in CCH Employment Practices Guide, ¶ 16,904. The Secretary of Labor has applied that standard with respect to the employment practices of Federal contractors and subcontractors under Executive Order 11246, see, 33 Fed. Reg. 14392.

<sup>6</sup> The district court so found, and the majority below did not question that finding. 420 F. 2d at 1234.

<sup>7</sup> 420 F. 2d 1235, n. 8.

<sup>8</sup> Compare the legislative analysis of the majority below, 420 F. 2d at 1234-1235, with that of Judge Sobeloff dissenting, 420 F. 2d at 1241-1243.

703(h). For while it is understandable that Congress should have reserved to employers the right to test the abilities of prospective employees to perform the jobs for which they are being considered, it is contrary to the language of section 703(h) itself,<sup>9</sup> and inconsistent with the overriding objective of Title VII, to conclude, as the majority below did, that Congress intended to protect the use of such tests in circumstances where they are not shown to measure any such abilities.

The majority of the court of appeals also appears to have relied upon the proposition that the tests in question were the equivalent of the requirement of a high school education, and could be justified on that ground. But the passing scores used were the median scores of high school graduates, so that approximately one-half of all high school graduates would be barred from jobs by the use of those tests.

More significantly, however, the Company's reliance on Section 703(h) begs the question. For it is clear that the requirement of a high school education has a highly discriminatory impact. And the lack of any business necessity is shown by the fact that white employees have performed satisfactorily and have been promoted to high ranking jobs in the favored "inside" departments without such an education.

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<sup>9</sup> The protection of 703(h) is limited to "any professionally developed *ability* test" which is not "intended *or used*" to discriminate (emphasis added). The concept of an "ability test" suggests a test which measures relevant abilities. And the coupling of the word "used" with that of "intended" demonstrates that Congress was concerned with discriminatory impact as well as discriminatory motive and purpose.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1970.

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IN THE

**Supreme Court of the United States**

October Term, 1960

No. 998

124

**WILLIE B. GREEN, et al., Petitioners,**

**v.**

**DUKE POWER COMPANY, a Corporation, Respondent.**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

**MOTION OF UNITED STEELWORKERS OF  
AMERICA, AFL-CIO  
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

**and**

**BRIEF FOR UNITED STEELWORKERS OF  
AMERICA, AFL-CIO, AMICUS CURIAE**

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IN THE  
**Supreme Court of the United States**  
October Term, 1969

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No. 1405

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WILLIE S. GRIGGS, *et al.*, *Petitioners*,

v.

DUKE POWER COMPANY, a Corporation, *Respondent*.

---

**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE**

United Steelworkers of America, AFL-CIO (hereinafter "USWA"), moves for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari. The consent of petitioners was obtained, but consent was refused by respondent.

USWA is a labor organization representing approximately 1,250,000 employees in the steel, aluminum, nonferrous and metal fabricating industries. While USWA does not maintain statistics on the race or nationality of its members, it is believed that approximately a quarter of a million of USWA's members are Negroes, and that a substantial segment of USWA's membership consists of members of other minority groups. One of USWA's Constitutional objectives is "to protect and extend . . . civil rights and liberties". In pursuit of that objective, USWA actively campaigned for passage of the Civil Rights Act of 1964, especially Title VII's prohibition of employment discrimination.

The issue presented by the petition in the instant case is whether an employer violates Title VII by utilizing non-job-related tests and standards as criteria for determining



employees' eligibility to advance or transfer within the plant. The court below held that such tests and standards are not violative of Title VII, absent evidence of an actual intent to discriminate. USWA believes that this holding is dangerously wrong and warrants review by this Court.

USWA has been fighting for decades to eliminate through collective bargaining the use of non-job-related tests and standards as criteria for job advancement, because such devices are irrelevant to the employer's need for determining competence to perform the particular jobs sought by his employees, are unfairly weighted against those who have received inadequate or inferior educations, and are culturally biased.

USWA's quest at the bargaining table has met with mixed success. The current agreements between USWA and most of the major steel producers provide that all tests "shall be free of cultural, racial or ethnic bias".<sup>1</sup> They further provide that (with two exceptions discussed below):

"[W]here tests are used by the Company as an aid in making determinations of the qualifications of an employee, such a test . . . must in any event be a job-related test. A job-related test, either written or in the form of an actual work demonstration, is one which measures whether an employee can satisfactorily meet the specific requirements of that job including the ability to absorb any training which may necessarily be provided for that job."<sup>2</sup>

The two exceptions relate to entrance into the apprenticeship programs (which train employees for certain trade

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<sup>1</sup> Agreement between United States Steel Corporation and the United Steelworkers of America, dated August 1, 1968, Appendix F, Paragraph 5(b). Identical language appears in USWA's agreements with most of the other major steel producers.

<sup>2</sup> *Id.*, Appendix F, Paragraph 1.

and craft jobs) and the filling of trade and craft vacancies.<sup>3</sup> USWA has been unable in collective bargaining to win express assurance that in filling apprenticeships and trade and craft vacancies the employers will utilize only tests which are job-related. Nevertheless, USWA believes that to the extent employers use standards for these jobs which are not job-related they are violating Title VII, and it is testing this claim in a pending federal action.<sup>4</sup>

USWA's goal is to eradicate, either in collective bargaining or through litigation, non-job-related testing and standards wherever they continue to be utilized by employers whose employees it represents (apprenticeship and trade and craft vacancies in the basic steel industry, and the broader use of such tests by many smaller producers who have not agreed to the basic steel provision quoted above). The decision below, holding that the utilization of non-job-related tests and standards does not violate Title VII, is a major threat to the fulfillment of USWA's goal. Accordingly, USWA is vitally interested in the outcome of this litigation, and begs leave to file the attached brief *amicus curiae*.

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<sup>3</sup> *Id.*, Appendix F, Paragraphs 3 and 4.

<sup>4</sup> *United States v. Bethlehem Steel Corp.*, Civil No. 1967-432 (W.D.N.Y.). The employer requires a high school degree or its equivalent for admission to its apprenticeship programs. USWA, believing that many of the programs do not require this degree of educational attainment, is challenging the requirement as violative of Title VII.

IN THE  
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October Term, 1969

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No. 1405

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WILLIE S. GRIGGS, *et al.*, *Petitioners*,

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DUKE POWER COMPANY, a Corporation, *Respondent*.

**BRIEF FOR UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, AMICUS CURIAE**

This case poses an issue which, perhaps more than any other, will determine whether Title VII can succeed in according minority employees equal opportunities in employment.

Title VII expressly prohibits hiring and job assignment based, *inter alia*, on race or national origin, and we know of no employer who today openly conditions access to jobs on such bases. Nevertheless, the same results can be achieved—whether or not so intended—by the utilization of factors “neutral on their face” which are unfairly slanted against minority groups. It is a sad but inescapable fact that Negroes, Mexican-Americans, Puerto Ricans and other minority groups *as a class* have suffered educations inferior to those of whites *as a class*. This deficiency is reflected not only in the number of grades completed, but also in the fact that the *quality* of education afforded to minorities so often is inferior to that afforded to whites.<sup>1</sup>

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<sup>1</sup> For a contemporary demonstration of the inequality between predominantly white and predominantly black schools in a large city, see Judge Wright’s exhaustive analysis of the District of Columbia school system in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

Title VII cannot completely eradicate the employment disadvantage suffered by employees who have received inadequate education. Educational deficiencies of minority employees necessarily preclude their advancing to jobs which *require* educational skills they do not possess. An employer does not violate Title VII by denying advancement to an employee who lacks the ability to perform the job to which he aspires. The solution to this problem lies elsewhere; it will not be found in Title VII.<sup>2</sup>

But Title VII can, and should, be implemented to eradicate employment disadvantage which results from an employer's use of standards for advancement which are *greater* than those required to perform the jobs involved. In these circumstances, employees who are in fact qualified will, nevertheless, be barred. Since minority workers as a class are less likely to meet excessive or irrelevant requirements, on account of educational deficiencies, the effect is plainly discriminatory.<sup>3</sup>

The unfairness of utilizing excessive or irrelevant standards for job advancement is dramatically illustrated by the facts of the instant case. Historically, the employer assigned Negroes only to its "Labor" department. In 1966, presumably in response to passage of Title VII, the employer provided that these employees could now transfer to the higher paying, more attractive departments previously re-

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<sup>2</sup> In the steel industry, the problem is being attacked through an experimental program of in-plant education, designed to advance employees from illiteracy through high school equivalency, thereby enabling them to qualify for higher paying jobs. The program is jointly sponsored by the federal government, USWA and the major steel companies.

<sup>3</sup> Non-job-related testing is one form of excessive standard—probably the most common one—but it is by no means the only device which works this injustice. For example, an employer who does not test at all, but who requires a high school diploma for advancement to jobs which in fact do not require that degree of educational attainment, equally discriminates.

served for whites. In order to transfer, however, the employees would have to achieve "passing" scores on two "quickie" tests—the Wonderlic Personnel Test and the Bennett Mechanical AA test.<sup>4</sup> These tests are in the record, and warrant the Court's attention. Taking the Wonderlic test as an example, it is doubtful that even one of its fifty questions is relevant to some of the jobs to which Negroes might seek to transfer in respondent's plant. For example:

\* \* \*

4. Answer by printing YES or NO. Does B. C. mean "before Christ"?

\* \* \*

20. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets, if false, put an (F) in the brackets.

moss A stone gathers rolling

\* \* \*

22. Two of the following proverbs have similar meanings. Which ones are they?

1. Straws show which way the wind blows.
2. An empty sack can't stand straight.
3. No doctor at all is better than three.
4. All is not gold that glitters.
5. Too many cooks spoil the broth.

\* \* \*

---

<sup>4</sup> The Company treated a score of 20 on the Wonderlic test as "passing" (Exhibit Volume, pp. 112b-113b). According to the publishers of the test, however, the passing score for *skilled mechanics* and *sub-foremen* is 18 and for other categories of industrial employees it is lower. E. F. Wonderlic, Wonderlic Personnel Test Manual, page 5 (E. F. Wonderlic Associates, Inc. 1966). Thus, the Company denied Negroes access to jobs considerably less challenging than that of a skilled mechanic unless they achieved scores higher than that which the publisher considers necessary to qualify as a skilled mechanic.

43. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? All good things are cheap, all bad things very dear. Goodness is simple; badness is manifold.

\* \* \*

47. Two of the following proverbs have similar meanings. Which ones are they?

1. Perfect valor is to do without witnesses what one would do before the world.
2. Valor and boastfulness never buckle on the same sword.
3. The better part of valor is discretion.
4. True valor lies in the middle between cowardice and rashness.
5. There is a time to wink as well as to see.

\* \* \*

These questions *perhaps* might have utility on a law school aptitude exam. As a measure of ability to fill jobs in an industrial plant they are ludicrous. And as a barrier to Negro advancement they are vicious—the more so because employers are growing increasingly enamored of these kinds of tests, and Wonderlic is one of the most popular.

The court below has held that the use of this test does not violate Title VII, absent evidence that it was adopted *for the purpose of* discriminating. That holding, if not reversed, will cripple Title VII. Too often employers, whether for non-discriminatory reasons or for discriminatory reasons which could never be proved, elect to staff their plants with employees who are super-qualified. In such cases, the plaintiffs will be able to prove disastrous effects upon the job opportunities of minority employees, and lack of business necessity, but not improper motivation. Whether such proof suffices to establish a violation of Title VII is an issue which *must* be decided by this Court.

Petitioners have set forth solid grounds why certiorari should be granted. No point would be served by our duplicating that showing. We merely wish to apprise the Court of what thirty-four years of representation in the metals industries has taught the Steelworkers: unless this Court strikes down non-job-related tests and standards, the unhappily plight of minority employees in American industry cannot end.<sup>5</sup>

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<sup>5</sup> In our motion for leave to file this brief, *supra*, we recount USWA's partial success in securing abolition of non-job-related tests through collective bargaining. While that avenue obviously affords hope for alleviating this problem, it can never be the total answer. Too many employees—numbering in the millions—are not represented by unions and thus have no mechanism, other than Title VII, for securing relief from these evils. And even collective bargaining can do the job only where the employer agrees, or where the employees' bargaining strength is sufficient to exact such an agreement.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, ~~1969~~ 1970

No. [REDACTED] 124

WILLIE S. GRIGGS, *et al.*,

*Petitioners,*

v.

DUKE POWER COMPANY, a Corporation,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 1405

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WILLIE S. GRIGGS, *et al.*,

*Petitioners,*

v.

DUKE POWER COMPANY, a Corporation,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**BRIEF FOR PETITIONER**

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**Opinions Below**

The opinion of the Court of Appeals and accompanying dissent of Judge Sobeloff is reported at 420 F.2d 1225 (1970). The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). All opinions are reprinted in the Appendix.

**Jurisdiction**

The judgment of the Court of Appeals for the Fourth Circuit was entered January 9, 1970 and petition for a writ of certiorari was filed in this Court on April 9, 1969 and was granted on June 29, 1970. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### **Questions Presented**

Whether the intentional use of psychological tests and related formal educational requirements as employment criteria violates the race discrimination prohibition of Title VII, Civil Rights Act of 1964, where:

- (1) the particular tests and standards used exclude Negroes at a high rate while having a relatively minor effect in excluding whites, *and*
- (2) these tests and standards are not related to the employer's jobs.

### **Statutory Provisions Involved**

United States Code, Title 42:

§ 2000e-2(a) [703(a) of Civil Rights Act of 1964]

- (a) It shall be an unlawful employment practice for an employer—
  - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
  - (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## § 2000e-2(h) [§ 703(h) of Civil Rights Act of 1964]

- (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

## § 2000e-5(g) [§ 706(g) of Civil Rights Act of 1964]

- (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

### **Statement of the Case**

This is a class action under Title IV of the Civil Rights Act of 1964 brought by a group of incumbent black workers against their employer, the Duke Power Company (hereinafter Duke). The petitioners claim that various aspects of Duke's promotional policies effectively deny them equal opportunity to jobs above the laborer category. The action was commenced following proceedings before the Equal Employment Opportunity Commission (hereinafter sometimes "EEOC") in which reasonable cause was found to believe that the company was engaging in gross practices of racial discrimination (A. 2b-4b).

All the petitioners are employed at Duke's Dan River Steam Station, a power generating facility located at Draper, North Carolina (A. 55a). The employees at this

plant are divided into five departments: Operations, Maintenance, Laboratory and Test, Coal Handling, and Labor. (Because employees in all departments except Coal Handling and Labor work inside the plant these other departments will be referred to collectively as the "inside" departments).<sup>1</sup>

Black workers have been employed at this plant for a number of years. There are now 14 blacks out of 95 total employees (A. 19b). However, these blacks have been tightly controlled. The District Court found,

"at some time prior to July 2, 1965, Negroes were relegated to the [L]abor [D]epartment and prevented access to other departments by reason of their race." (A. 32a).

As might be expected, the Labor Department is the least desirable one in the plant and is the lowest paid. Moreover, blacks have even been denied the better paying jobs in that department. The *maximum* wage ever earned by a black worker in the Labor Department, including some with almost 20 years seniority, is \$1.645 per hour (A. 109b). This maximum is less than the *minimum* (\$1.875) paid to any white in the plant (A. 105b-108b). It is drastically less than the wages paid to whites with comparable seniority in the other departments where top jobs pay \$3.18 or more per hour (A. 72b).<sup>2</sup>

The first breach in this practice of relegating black workers to low level positions in the Labor Department did not occur until August 6, 1966 (more than a year after the July 2, 1965 effective date of Title VII) when a black laborer

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<sup>1</sup> There are also a few non-departmental jobs at the plant, all of which are located inside except the watchmen (A. 58a).

<sup>2</sup> These pay scales are based on 1967 data in the record; but the same disparity continues to exist today.

with a high school diploma and almost 13 years of seniority was promoted to a "learner" position in the Coal Handling Department paying \$1.95 per hour (A. 83b, 109b, 126b). At this time, whites with similar seniority and less education were earning \$3.00-\$3.66 (A. 105b-108b, 126b).

By the time of trial, Duke had apparently relented from its formal practice of restricting all black workers to low level jobs in the Labor Department. However, the effect of that practice was largely maintained by a company policy precluding anyone from transferring to Coal Handling or to one of the inside departments unless he either (1) had a high school diploma, or (2) achieved a particular score on each of two quickie "intelligence" tests—the 12-minute Wonderlic Test and the 30-minute Bennet (sometimes referred to as the "Mechanical AA") (A. 20b-22b). Only 3 or 4 of the 14 black workers at Dan River could satisfy these requirements.<sup>3</sup> The other 10 or 11 black workers were destined to a permanent low paid laborer status.

In contrast to its effect on black workers, these high school and test requirements had no application to anyone already in the Coal Handling Department or an inside department, either as a requirement for maintaining his present position within his departmental area (A. 102a) or for securing promotion to jobs paying \$3.18 per hour or more (A. 72b). All of the white workers in the plant were in these better departments.

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<sup>3</sup> Three of the black workers had high school diplomas (A. 109b, 126b). The Court of Appeals found that a fourth black worker, Willie Boyd, had acquired an equivalency diploma which the company would accept in lieu of the regular diploma. Willie Boyd's status is not entirely clear on the record. However the situation as to him was mooted by the partial relief granted in the Court of Appeals. See pp. 7-8, *infra*.

Thus, for example, Clarence M. Jackson, a black with 7th grade education hired in 1951 as a laborer, remained one in 1967 (at \$1.645 per hour) and was unable to transfer to a better job (A. 109b). By contrast, Jack O'Dell, a white with 5th grade education, hired in 1951 as a helper, had gained promotion to Coal Handling Operator by 1967 (at \$2.79 per hour) (A. 106b-126b). Jady Martin, a white with 7th grade education hired in 1956 as a helper, had worked his way to Mechanic "B" in 1965 and was able to gain promotion to Mechanic "A" in 1966 (at \$3.41 per hour) (A. 106b-126b). Rollins, a white with 7th grade education, is the labor foreman; he is responsible for supervising blacks, several of whom have more formal education. Neither O'Dell, Rollins nor Martin was ever called upon to take a test.

The first of Duke's transfer requirements (high school diploma) had been in effect for a number of years prior to this action (A. 20b). The second (passing a test battery) was newly adopted in September, 1965, in response to a request from a number of white non-high school graduates in the Coal Handling Department who wanted an alternative chance for promotion to inside jobs (A. 85a-87a). Both requirements were challenged by petitioners on the grounds that (1) they imposed a special burden on black employees at Dan River not similarly imposed on white employees, and (2) even if similarly imposed that they constituted discriminatory requirements which are not related to the job needs of Duke.

The District Court denied relief on either ground. The Court of Appeals, however, accepted petitioners' claim that the requirements were not similarly imposed insofar as whites hired prior to either requirement were free to be promoted without ever complying while contemporaneously hired blacks were not. The court properly ruled that blacks

hired prior to either requirement must be given the same promotional opportunities as contemporaneously hired whites—*i.e.*, freed of the burden of either having a diploma or passing a test. This aspect of the Court of Appeals decision, on which Supreme Court review has not been sought, provided full relief to 7 of the 11 black workers who could not meet the diploma/test requirement. The problem of the remaining 4 blacks, as to whom the Court of Appeals denied relief with Judge Sobeloff dissenting, is now before this Court.

These four black workers were hired between 1957 and 1963 and have worked steadily at the plant since then (A. 109b). Their formal educations range from 4th grade to 10th grade, and one has also received special training in auto mechanics' school (A. 126b). All four are in laborer positions paying \$1.53 to \$1.645 per hour (A. 109b). Duke has conceded that these laborers might perform well in better paid departments such as Coal Handling, if given the chance (A. 124b); and that many of the black laborers have worked with the Coal Handling Department for many years and thereby gained experience and familiarity with the operations of the department (A. 106a, 124b). The company's job descriptions prepared in connection with this case indicate that the functions of Coal Handling employees are similar in many respects to those of laborers (A. 48b-49b, 65b-66b). However, Duke has made no attempt to assess the job performance, work experience or other qualifications of these four longtime laborer employees to assess their potential for advancement (A. 104a).

Rather, the sole reason given for freezing them in the labor category is their failure to meet the diploma/test requirement. This requirement has no sound basis in fact or experience. It was adopted without any study, evaluation or analysis of either the abilities needed on the jobs



or the qualities measured by the requirement (A. 93a, 103a-104a, 19b, 57b-71b, 85a-86a, 115b-116b, 199a-200a). The Wonderlic test in particular has a heavy cultural orientation seemingly unrelated to most job functions at the plant (A. 101b).

### **Summary of Argument**

This is the first Title VII race discrimination case to come before this Court on the merits. It follows five years of experience under this landmark remedial statute during which lower courts have generally sought to give it a broad and flexible interpretation. This case thus presents the Court with the first opportunity to affirm or reject the general course taken by the great majority of lower courts and will fundamentally affect the future direction of litigation under the Act.

#### **I.**

**TITLE VII REQUIRES THAT TESTS AND DIPLOMA REQUIREMENTS BE RELATED TO JOB PERFORMANCE NEEDS WHERE SUCH REQUIREMENTS UNEQUALLY EXCLUDE BLACKS FROM EMPLOYMENT OPPORTUNITIES. IN FAILING TO INSIST UPON SUCH JOB RELATEDNESS, THE DECISION OF THE COURT BELOW INVITES EVASION OF TITLE VII.**

#### *A. Tests and Diploma Requirements Have a Vast Discriminatory Potential.*

Petitioners challenge here the use of the diploma/test requirement as prerequisites for jobs where such requirement *unequally* excludes blacks from employment opportunities and is not related to job performance. Petitioners contend that Title VII requires that the diploma/test requirement be related to job performance where such re-

quirement unequally excludes blacks from employment opportunities.

Title VII, potentially a remedial milestone in civil rights legislation, bars not only outright refusals to hire blacks; but it also makes unlawful subtle or superficially neutral forms of racial discrimination in employment. "Objective" criteria such as the diploma/test requirement is a potent tool for reducing black employment opportunities, to the extent of frequently excluding blacks. In one typical case, the EEOC has found that a battery of tests (including the Wonderlic and Bennett used by Duke Power) excluded a disproportionate number of Negroes. Similarly, the Commission has found, confirmed by various studies, a great racial disparity in test scores and receipt of a high school diploma.

The gross differences between test scores achieved by blacks and whites are directly attributable to race because of the differences in education because of segregated schools and differences in cultural environments. This is largely true today and overwhelmingly true for petitioners who completed their education before *Brown* began its erosion of the pervasive practices of segregation and discrimination. Such discrimination on the basis of education and test taking ability was well recognized by this Court in *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969).

The facts regarding the disparity between black/white educational opportunities make a salient point. If requirements such as passage of "intelligence" tests and a high school diploma could be imposed without regard to job relatedness almost every employer in the South could create a substantial and unjustifiable job preference in favor of whites. This possibility is particularly under-

scored by the increased use of tests since the passage of Title VII.

*B. The Established Method of Guarding Against Discriminatory Test and Educational Requirements, While Protecting the Reasonable Needs of an Employer, Is to Insist That Such Requirements Be Related to Job Performance Needs.*

The established method of guarding against discriminatory test and educational requirements while protecting the reasonable needs of an employer is to insist that such requirements be related to job performance needs. This means that the tests and educational requirements must fairly measure the knowledge of skills required by the particular job which the applicant seeks. Both the Equal Employment Opportunity Commission and the office of Federal Contract Compliance require that test and educational requirements be job related. Several United States District Courts have issued decisions in accord with the view of EEOC and OFCC, notably *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969).

In looking to job relatedness as the touchstone of the fair use of test and educational requirements, the courts, federal and state employment agencies are merely carrying forward a Title VII principle established in a series of cases challenging other unlawful employment requirements, which though objective in form have the effect of systematically reducing Negro job opportunity. For example, courts have struck down nepotism and seniority rules which although adopted for nonracial reasons had a racially discriminatory effect and were not job related.

The rationale of the job relatedness doctrine is clear. If a test, education (or other objective requirement) is job

related, employees are hired or promoted on the basis of their ability to perform, which is fair. But where a test or educational requirement is not job related, hiring and promotion is done on the basis of educational and cultural background which given the facts about schooling, housing and other factors affected by race is only thinly veiled racial discrimination.

By failing to insist on a reasonable relationship between the diploma/test requirement and job performance needs, both the Court of Appeals and the District Court have rejected the established standard for preventing unfair use of test and educational requirements—job relatedness—and have opened the door to evasion of Title VII. This Court should reverse and adopt the job relatedness standard.

## II.

THE RECORD BELOW OFFERS NO BASIS FOR FINDING THAT THE DIPLOMA/TEST REQUIREMENT MEETS A JOB RELATEDNESS STANDARD.

The method of determining whether a diploma/test requirement is reasonably related to job performance needs will vary from case to case. Many factors will influence this determination, including the extent to which the requirement is prejudicing black workers. The diploma/test requirement used in the instant case is clearly one which has a serious prejudicial effect on black workers. The record in this case is devoid of any meaningful showing by Duke that this requirement is related to job performance needs. If the court below had made any inquiry beyond merely looking for an affirmative showing of racial animus, the practice of the respondent would have been found to be unlawful.

A. *The Diploma/Test Requirement Clearly Has a Prejudicial Effect on Black Workers.*

In addition to general statistics which firmly establishes the prejudicial effect of the Duke's diploma/test requirement the effect of this requirement can be seen in the specific impact on black workers at Duke. The only persons burdened by this requirement are the four black petitioners here involved; they are frozen in the all black Labor Department where the top pay is \$1.895 per hour. All of the white workers are in departments with promotional expectancies leading to substantially higher pay levels.

B. *It Cannot Be Assumed Without Supporting Evidence That the Continuation of This Prejudicial Requirement Is Related to Its Job Performance Needs.*

It has been demonstrated in dozens of studies that there is commonly little or no relationship between test scores and job performance. Aptitude tests may predict academic performance rather well. But industrial testing involves a range of skills and abilities entirely divorced from a pristine test room setting. Because of the frequency with which tests show little or no relation to job performance, it cannot be assumed in any particular case that a test is making a useful prediction without supporting evidence. In view of the low validity and reliability of tests and education requirements in assessing job performance abilities, no requirement that grossly prefers whites over Negroes can be assumed to be based on job performance unless supported by proper study and evaluation. Absent such study and evaluation, the use of these requirements constitutes an unjustified exclusion of Negroes in violation of Title VII.

*C. Duke Has Made No Study or Analysis or Introduced Any Evidence at All That the Diploma/Test Requirement Is Related to Its Job Performance Needs.*

The record in this case shows that Duke's diploma/test requirement is not based on business needs and was adopted without proper study and evaluation. This case does not involve persons unknown to Duke; it involves only four persons, each of whom has worked for Duke for at least seven years. The Company is equipped to evaluate not only the general reliability and performance of these men, but also their specific abilities to learn and perform in other jobs. Indeed, Duke concedes that these men might perform well if given a chance. A lack of the need for the diploma/test requirement is clearly demonstrated by the readiness of Duke to permit present white employees in the better departments to stay and be promoted without meeting this requirement. In face of the undisputed evidence that the diploma/test requirement is not essential and data showing the serious racially prejudicial effect on black workers, Duke's persistence in maintaining this requirement is but a feeble attempt at rationalization for the continuation of this practice.

1. *The High School Diploma Requirement*—Company officials testified that this requirement was adopted without study or evaluation and without any particular evidence that it would serve the employment needs of Duke. It was adopted on the basis of what can be charitably described as blind hope. If Duke is permitted to adopt a high school diploma requirement on the flimsy basis set out on this record any employer in the country would also be absolutely free to adopt such a requirement or some other educational requirement which would have the same effect of grossly preferring whites over Negroes.

2. *The Test Requirement*—The situation regarding the tests is even less justifiable than that regarding the high school diploma requirement. This requirement was adopted to protect a group of white employees in Coal Handling from the burdens of the high school diploma requirement. As in the case of the high school diploma requirement it was adopted without study, evaluation or analysis. Attempts by Duke at relating test scores to job success have been unsuccessful. Its only justification is as a substitute for the high school requirement and if that falls the test requirement must fall.

### III.

#### DUKE'S DISCRIMINATORY PRACTICES DERIVE NO PROTECTION FROM SECTION 703(h) OF TITLE VII.

Section 703(h) provides that an employer may rely upon a "professionally developed ability test" which is "not designed, intended or used to discriminate." This provision applies only to tests. This section has no applicability whatsoever to the high school diploma requirement which clearly violates Title VII for the reasons set out above. While section 703(h) could have relevance to the test requirement, it does not apply because Duke's tests are not "professionally developed" within the meaning of the statute, are "intended" to discriminate, and are being "used" to discriminate even if not so intended.

## ARGUMENT

This is the first Title VII race discrimination case to come before this Court on the merits. It follows five years of experience under this landmark statute during which courts have been enlightened and perceptive in giving it a broad and flexible interpretation.<sup>4</sup> This judicial approach is consistent with the remedial role which Title VII was designed to play in countering employment discrimination. It has given Title VII the potential for becoming an effective force for fair employment in contrast to the many state fair employment laws which languished under restrictive applications. This case thus presents the Court with the first opportunity to affirm or reject an important general course which the lower courts have taken. The decision in this case will therefore fundamentally determine the future direction of Federal fair employment law. Judge Sobeloff eloquently stated this point in his dissent below:

"This decision we make today is likely to be as persuasive in its effect as any we have been called upon to make in recent years.

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This case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are poten-

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<sup>4</sup> See, e.g., *Local 189, Papermakers and Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *United States v. Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969); *Müller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968); *Robinson v. Lerillard Co.*, 62 Lab. Cas. 9423 (M.D.N.C. 1970).



tially qualified. . . . *On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether The Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.*" 420 F.2d at 1237 (Emphasis added.)

The decisions of the Court of Appeals and the District Court interpret Title VII so as to offer virtually no protection against such arbitrary use of diploma/test requirements, even where, as in this case, the requirements are of such nature as to have a discriminatory impact on black workers. Petitioners contend that this interpretation of Title VII is unnecessarily narrow and that it led the courts below to sustain a practice which would have been found unlawful under a proper interpretation of Title VII.

## I.

**Title VII Requires That Tests and Diploma Requirements Be Related to Job Performance Needs Where Such Requirements Unequally Exclude Blacks From Employment Opportunities. In Failing to Insist Upon Such Job Relatedness, the Decision of the Court Below Invites Evasion of Title VII.**

**A. Tests and Diploma Requirements Have a Vast Discriminatory Potential.**

Title VII was a legislative milestone<sup>5</sup> designed to be a powerful force in alleviating the oppressed employment situation of black workers.<sup>6</sup> As such it was framed in broad terms, barring not only outright refusals to hire blacks, but also making it unlawful "otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment,"<sup>7</sup> or to "classify . . . employees in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,"<sup>8</sup> because of race. With this sweeping language Congress made it clear that Title VII was to reach all deterrents to full black employment opportunity.

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<sup>5</sup> *Ranjet v. City of Lansing*, 293 F. Supp. 301, 309 (D. Mich. 1969).

<sup>6</sup> See, e.g., H.R. Rep. No. 570, 88th Cong., 1st Sess. 2-3 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess. 138-41 (1963) (concurring report of Congressman McCulloch and others); Hearings on Equal Employment Opportunity before the General Subcomm. on Labor of the House Comm. on Education & Labor, 88th Cong., 1st Sess. *passim* (1963); Hearings on Equal Employment Opportunity before the Subcomm. on Employment & Manpower of the Senate Comm. on Labor & Public Welfare, 88th Cong., 1st Sess. *passim* (1963).

<sup>7</sup> Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1).

<sup>8</sup> Section 703(a)(2), 42 U.S.C. §2000e-2(a)(2).

There is no doubt that "objective" criteria, such as tests and educational requirements, are potent tools for substantially reducing black job opportunities, often to the extent of wholly excluding blacks. The National Advisory Commission on Civil Disorders (the Kerner Commission) put it bluntly:

"Racial discrimination and unrealistic and unnecessarily high minimum qualifications for employment or promotion often have the same prejudicial effect."<sup>9</sup>

In one typical case, the Equal Employment Opportunity Commission found that use of a battery of tests, including the Wonderlic and Bennett tests used by Duke Power Company, resulted in 58% of whites passing the tests but only 6% of blacks.<sup>10</sup> The EEOC has recently ruled:

"It is now well settled that the use of the Wonderlic, Bennett and certain other preemployment tests result in rejection of a disproportionate number of Negro job applicants."<sup>11</sup> A flood of other studies confirm a great racial disparity in test scores, especially in the South where the disparity in educational opportunity has been the greatest.<sup>12</sup>

<sup>9</sup> Commission Report at 416 (Bantam Books ed. 1968).

<sup>10</sup> Decision of EEOC, Dec. 2, 1966, reprinted at p. Br. Ap. 1, *infra*.

<sup>11</sup> EEOC decision 70-552 (Feb. 19, 1970) in CCH Fair Emp. Prac. Guide ¶6139.

<sup>12</sup> See J. Kirkpatrick, et al., *Testing and Fair Employment* 5 (1968); J. Coleman, *Equality of Educational Opportunity* 219-20 (1966); authorities collected in Cooper & Sobol, *Seniority and Testing under Fair Employment Laws*, 82 Harv. L. Rev. 1598, 1639-41 nn. 11, 13, 14, 15, 16, 17.

The Wonderlic test is a mixture of questions on vocabulary, mathematics, and other subjects, with a heavy emphasis on vocabulary and reading ability. A testee is expected to answer questions such as:

"No. 11. ADOPT ADEPT—Do these words have

1. Similar meanings,
2. Contradictory,

The same disparate effect also results in the South when a high school diploma requirement is imposed. As of the last census, only 12% of North Carolina Negro males had completed high school, as compared to 34% of North Carolina white males.<sup>13</sup>

These gross differences between blacks and whites are directly traceable to race. The petitioners, who were born black, received a different education in segregated schools and grew up in a different cultural environment than they would have had they been born white. They were forced to drop out of school earlier because of economic necessity produced by discrimination and because discrimination led them to conclude that they could not make use of further education. These facts are largely true even for the Negro child born today. They are overwhelmingly true for peti-

3. Mean neither same nor opposite?"

• • •

"No. 19. REFLECT REFLEX—Do these words have

1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 24. The hours of daylight and darkness in September are nearest equal to the hours of daylight in

1. June
2. March
3. May
4. November"

(See A. 101b-103b) The ability to answer such questions is obviously related to formal schooling and cultural background. The vocabulary questions call for an appreciation of subtle differences in word meanings and parts of speech; the question of hours of daylight cannot be answered reliably without knowledge of the vernal equinox.

<sup>13</sup> EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, at §1607.1(b) (August 1, 1970). U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Part 35, at Table 47 p. 167.

tioners, most of whom finished their schooling before the 1954 *Brown* decision began the erosion of pervasive practices of segregation and discrimination. The resulting inferior education and a tendency to earlier dropping out of school are racial characteristics of petitioners just as clearly as is living in a ghetto. This point—that discrimination on the basis of education and test-taking ability is a form of racial discrimination—was recognized by this Court in *Gaston County, North Carolina v. United States*, 395 U.S. 285 (1969). There the appellant had sought to institute a literacy test for voter registration. The United States opposed this test under the Voting Rights Act of 1965, contending that use of the test had “the effect of denying or abridging the right to vote on account of race or color” because of the inferior educations blacks had received; and this Court sustained the Federal government contention.

These facts regarding black/white education disparities make a very salient point, which numerous courts and governmental equal employment agencies have recognized. If requirements such as a high school diploma or passage of an “intelligence” test could freely be imposed, every employer in North Carolina and throughout the South could create a racially discriminatory promotional preference of three to one, or better, in favor of whites. Such a practice could result in a closing of the decent employment market to all but a handful of blacks. This is not an idle fear; since the enactment of Title VII there has been an upsurge in use of tests, often as the sole basis for making employment or promotion decisions.<sup>14</sup>

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<sup>14</sup> U.S. Dep’t. of Labor, Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246, at §§1(d), (e), 33 Fed. Reg. 14392 (1968); Wall St. J., Feb. 9, 1965, at 1, col. 6.

On the other hand, courts and equal employment agencies have also recognized that Title VII does not go so far as to guarantee a job to every black citizen. It is an unfortunate fact of life in America that a heritage of discrimination has left many blacks with insufficient skills for many of the better jobs in the economy. The disparity in black-white test scores and education levels is to some extent a reflection of the same deprivation as this lack of skills.

**B. *The Established Method of Guarding Against Discriminatory Test and Educational Requirements, While Protecting the Reasonable Needs of an Employer, Is to Insist That Such Requirements Be Related to Job Performance Needs.***

The universal response of those courts and agencies concerned by this dilemma has been to insist on job-relatedness as the *sine qua non* of fair use of tests and educational standards. This does not mean that a test must be a sample of the actual job applied for or that employers cannot consider reasonable future promotional possibilities in establishing a test. As defined by the Equal Employment Opportunity Commission, the agency charged with enforcement of Title VII, it means merely that tests must:

“fairly measure the knowledge or skills required by the particular job or class of jobs which the applicant seeks or which fairly affords the employer a chance to measure the applicant’s ability to perform a particular job or class of jobs.” EEOC Guidelines on Employment Testing Procedures (1966), reprinted at A. 129b, 130b.<sup>15</sup>

<sup>15</sup> For decisions applying these guidelines, see, *e.g.*, EEOC Decision 70-552 (Feb. 19, 1970), in CCH Fair Employment Prac. Guide ¶6139; EEOC Decision Case No. NO6809-327E (June 18, 1969), in CCH Fair Employment Prac. Guide 8516; EEOC Decision, Dec. 6, 1966, reprinted at p. Br. Ap. 3, *infra*; EEOC Decision Dec. 2, 1966, reprinted at p. Br. Ap. 1, *infra*.

The EEOC takes a similar position regarding educational requirements.<sup>16</sup> Most recently the EEOC position has been elaborated in its new Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (August 1, 1970). These Guidelines which specifically cover intelligence and aptitude tests and educational requirements, *id.* at § 1607.2, demand that employers using tests have available

"data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job or jobs for which Guidelines are being evaluated." *Id.* at §1607.4(c).

Virtually the identical requirement is imposed by the Office of Federal Contract Compliance (OFCC) enforcer of Executive Order 11246 against discrimination by government contractors. Validation of Tests by Contractors and Sub-contractors subject to the Provisions of Executive Order 33 Fed. Reg. 14392, § 2(b) (1968). The same principles of job relatedness have also been adopted by the several state fair employment agencies which have spoken on the subject.<sup>17</sup>

In the courts, although no other Court of Appeals has dealt at length with issues of testing and educational requirements, at least two District Courts in other circuits

<sup>16</sup> See EEOC Decision, Dec. 6, 1966, reprinted at p. Br. Ap. 3, *infra*. Contrary to assertions made in respondent's opposition to certiorari, a careful reading of this EEOC decision will show that it involved an educational requirement (8th grade) as well as tests.

<sup>17</sup> California, Fair Employment Practices Equal Good Employment Practices, in CCH Employment Practices Guide ¶20,861; Colorado Civil Rights Commission Policy Statement on the Use of Psychological Tests in CCH Employment Practices Guide ¶21,060; Pennsylvania Human Relations Commission, Affirmative Action Guidelines for Employment Testing, in CCH Employment Practices Guide ¶27,295.

have done so, and have resolved the issue in favor of a job-relatedness requirement. Most explicit is *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969):

“[I]f there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them equal opportunity for public employment, then it becomes unconstitutionally unreasonable and arbitrary.” 30 F. Supp. at 1358.

This was a decision based on the Fourteenth Amendment. But the same view was adopted under Title VII in *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968), appeal noticed, 5th Cir. No. 27703. There the court reasoned:

“the court agrees in principle with the proposition that aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs.” 296 F. Supp. at 78 (dictum).

Other Courts of Appeals and District Courts have also indicated adherence to a similar point of view. See *United States v. Sheetmetal Workers Local 36*, 416 F. 2d 123, 136 (1969); *Dobbins v. Local 212*, IBEW, 292 F. Supp. 413, 433-34, 439 (S.D. Ohio 1968); *Penn v. Stumpf*, 308 F. Supp. 1283 (N.D. Calif. Feb. 3, 1970); cf. *Porcelli v. Titus*, 302 F. Supp. 726, 60 Lab. Cas. ¶9302 (D. N.J. 1969); *Colbert v. H.K. Corporation*, C.A. No. 11599 (N.D. Ga. July 6, 1970) appeal noticed August 3, 1970.<sup>18</sup>

<sup>18</sup> In *Parham v. Southwestern Bell Telephone Co.*, — F. Supp. —, 60 Lab. Cas. ¶9297 (W.D. Ark. 1969), appeal noticed, 8th



In looking to job relatedness as the touchstone of fair use of educational and test requirements, these courts are merely carrying forward a Title VII principle firmly established in a series of cases challenging other objective employment requirements. The use of tests and educational requirements is but one example of a new breed of racial discrimination. While outright and open exclusion of Negroes is passé, the use of various forms of neutral, objective criteria which systematically reduce Negro job opportunity are producing much the same result. As this Court has long recognized in other contexts of racial discrimination, those rules which are objective and neutral in form may well be racially discriminatory in substance and effect. Under this principle, the Court has, for example, struck down grandfather clauses for voter registration,<sup>19</sup> the use of tuition grant arrangements which foster segregated schools,<sup>20</sup> and the use of a gerrymander which undercuts Negro voting power.<sup>21</sup> Under Title VII, as well as in these other contexts, it is essential that "sophisticated as well as simple minded modes of discrimination"<sup>22</sup> be outlawed.

The initial Title VII case challenging an objective criterion that caused racial discrimination was directed at the practice of nepotism. In the context of a white dominated

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Cir. No. 19969, a series of preemployment tests were sustained without specifically inquiring into job-relatedness. However, since the court found that the tests were "simple", that "plaintiff himself did well on them", and that the tests were not operating as a serious barrier to black employment, it was hardly necessary to look to job-relatedness. *Id.* at 6746.

<sup>19</sup> *Guinn v. United States*, 238 U.S. 347 (1915).

<sup>20</sup> *Louisiana Financial Assistance Comm'r v. Poindexter*, 389 U.S. 571 (1968), affirming 275 F. Supp. 833 (E.D. La. 1967).

<sup>21</sup> *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>22</sup> *Lane v. Wilson*, 307 U.S. 268, 275 (1938).

work force, nepotism, even though primarily motivated by racially innocent familial purposes, has a highly discriminatory effect. A nepotic practice was therefore struck down in *Local 53, International Assoc. of Heat & Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). As the Fifth Circuit later explained, the nepotic practice violated Title VII because "it served no purpose related to ability to perform the work in the asbestos trade." *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). In other words, the practice was not job related.

The court in the *Papermakers Local 189* case went on to extend this job-relatedness principle to strike down certain seniority rules. These rules preferred white workers over their black contemporaries on the basis of seniority acquired when the black workers had been openly excluded from desirable jobs. Even though these seniority rules were adopted innocently for nonracial reasons, the court concluded that such rules could not be sustained where they had the effect of barring black workers from jobs they were capable of performing. *Id.* at 988. The same application of the job-relatedness principle to strike down discriminatory seniority rules has been made by the Eighth Circuit and by District Courts in the Sixth and Fourth Circuits. *United States v. Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (N.D. Ohio 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). See also *United States v. Hays Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969).<sup>23</sup>

<sup>23</sup> There is one District Court decision contra in the Fifth Circuit, *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. No. 27703. However, this decision preceded the Court of Appeals decisions in *Papermakers Local 189* and *Hayes Int'l. Corp.*, cited above, and is plainly overruled by them.

And in a very recent case, the principle was applied to strike down the discriminatory use of arrest records. *Gregory v. Litton Systems Inc.*, — F. Supp. —; 63 Lab. Cas. 91 9485 (C.D. D. Calif. July 28, 1970).

As Judge Sobeloff's dissenting opinion below explained, the teaching of these seniority and nepotism cases is that:

"the statute interdicts practices that are fair in form, but discriminatory in substance . . . The critical inquiry is business necessity and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end." 420 F.2d at 1238.

Judge Sobeloff went on to observe that this principle applies to discriminatory tests and educational requirements as well as to seniority and nepotism. Where such requirements are not job-related they are not justified by business necessity and must be struck down.<sup>24</sup>

The rationale of those courts and agencies in insisting upon job-relatedness is clear. If a test, educational standard (or other objective requirement) is job-related, employees are hired or promoted on the basis of their ability to perform, which is fair. But where a test or educational requirement is not job-related, hiring and promotion is done on the basis of educational and cultural background, which given the facts about schooling, housing and other factors affected by race, is only thinly veiled racial discrimination. This racial discrimination in some cases may be a product of naked racism. In other cases, it may simply be motivated by a commitment to what some may perceive as middle class values and certain personal life styles. But in either case, the result is the same—seriously reduced

<sup>24</sup> See generally Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1593, 1669-73 (1969).

black job opportunity and gross employment preference for whites over blacks<sup>25</sup>—and it is this discriminatory result which Title VII declares unlawful.<sup>26</sup>

The decision below stands out in bold relief against the virtually unanimous endorsement of the job-relatedness principle by other courts and agencies. This principle was openly rejected by the court below. Specifically, as to the test requirement, the Court of Appeals recognized:

“The [District Court] held that the tests given by Duke were not job-related. . . . 420 F.2d at 1234.

But the court went on to conclude:

“We agree with the district court that a test does not have to be job-related in order to be valid under [Title VII].” 420 F.2d at 1235.

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<sup>25</sup> Black unemployment, has run at roughly double the white rate for the past two decades and continues at that rate even today. See National Advisory Commission on Civil Disorders, Report 253 (Bantam Ed. 1968); Bureau of Labor Statistics, Employment and Earnings, June 1970, Table A-3, Major Unemployment Indicators.

<sup>26</sup> The emphasis or result rather than motive is clear in sections 703(a)(2) and 703(c)(2) of Title VII which define unlawful practices as those which “tend to deprive” or “adversely affect” because of race, without reference to the employer’s reasons for the practices. The only reference to intent in the general provisions of Title VII is in a remedial provision, section 706(g), which is designed only to assure that employers are not subjected to injunctions for accidental events. Any knowing and purposive act, such as the intentional adoption *and continuation* of test and educational requirement with full knowledge of its effects is covered by this provision. *Papermakers Local 189 v. United States*, 416 F.2d 980, 995-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). See Blumrosen, Seniority and Equal Employment Opportunity: A Glimmer of Hope, 23 Rutgers L. Rev. 268, 280-84; Cooper & Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1674-76 (1969). “Intent” is also referred in a special section dealing with tests, section 703(h), which is discussed at pp. 46-51, *infra*.

As to the diploma requirement, the court was less explicit, but it plainly did not ask, as do the EEOC and other courts and agencies, that the requirement be shown to "fairly measure knowledge or skills" needed on jobs at Dan River. Moreover, since Duke's own testimony established that the tests and the diploma requirement measure the same thing (A. 181a), if the tests are not job-related presumably the diploma requirement also is not. Instead of evaluating job relatedness, the Court of Appeals seemed to be searching for some affirmative evidence of racial animus—some showing of a motive to discriminate in adopting the challenged requirements. If this is to be the standard, then Title VII will be rendered largely ineffective in pursuing the goal of full fair employment. The record in this case indicates how easily any employer can justify even the most arbitrary and discriminatory use of tests under the standard applied by the Court of Appeals. See pp. 39-44, *infra*.

By its failure to insist on a reasonable relationship between the diploma/test requirement and job performance needs, both the Court of Appeals and the District Court have rejected the established standard for preventing unfair use of test and educational requirements and have opened the door to evasion of Title VII by innocence and design. This Court should recognize the expertise of the EEOC<sup>27</sup> and reaffirm the soundness of the job-relatedness requirement.

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<sup>27</sup> See *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Fawcus Machine Co. v. United States*, 282 U.S. 375, 378 (1931); *United States v. American Trucking Assn.*, 310 U.S. 534, 549 (1940); *United States v. Public Utilities Comm.*, 345 U.S. 295, 314-315 (1953); *FTC v. Mandel Bros.*, 359 U.S. 385, 391 (1959). This point is further developed in the brief of the United States as *amicus curiae*.

## II.

**The Record Below Offers No Basis for Finding That the Diploma/Test Requirement Meets This Job-Relatedness Standard.**

The method of determining whether a diploma/test requirement is reasonably related to job performance needs will vary from case to case. In some cases the relationship will be patent. For example, in one recent decision the EEOC sustained use of tests of arithmetic and change-making ability for selecting "checkers". In so doing, the Commission observed that the tests covered "specific skills (change making and computation) which are actually performed by incumbents of the job classifications for which they are administered".<sup>28</sup> In the case of generalized IQ or aptitude tests, the EEOC frequently calls for more thorough study to justify test use.<sup>29</sup> Obviously many factors will influence this determination, including the extent to which the requirement is prejudicing black workers. A requirement which does not result in a great preference for whites over blacks need be subjected to little, if any, examination under fair employment laws.<sup>30</sup> However, the diploma/test requirement used in this case is clearly one which has a serious prejudicial effect on blacks, and the

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<sup>28</sup> EEOC Decision No. 70-630, Case No. AT 68-3-824E (Mar. 17, 1970), in CCH Fair Employment Pract. Guide ¶6136.

<sup>29</sup> See EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (August 1, 1970). EEOC Decision No. 70-501, Case YAT9-633 (Jan. 29, 1970), in CCH Fair Employment Pract. Guide ¶6112 (covering several aptitude tests including Bennett test used by Duke); EEOC Decision No. 70-552 (Feb. 19, 1970), in CCH Fair Employment Pract. Guide ¶6139 (covering Wonderlic and Bennett tests used by Duke).

<sup>30</sup> See *Parham v. Southwestern Bell Telephone Co.*, — F. Supp. —, 60 Lab. Cas. ¶9297 (W.D. Ark. 1969).

record is devoid of any meaningful showing that the requirement is related to job performance needs. Therefore, if the court below had made *any* inquiry beyond merely looking for an affirmative showing of racial animus, the practices of Duke would have been found unlawful.

***A. The Diploma/Test Requirement Clearly Has a Prejudicial Effect on Black Workers.***

The prejudicial effect of this requirement is firmly established by the abundant data cited earlier—that only  $\frac{1}{3}$  as many blacks as whites in North Carolina have a high school diploma, and only a fraction as many blacks as whites will pass the Wonderlic and Bennett tests. See pp. 19-20, *supra*. But beyond these general statistics, the prejudicial effect can also be seen in the specific impact of the requirement at Duke. Since the requirement applies only to certain interdepartmental transfers, its real impact is only on those employees in departments who need to transfer for decent promotional opportunity. The only persons thus burdened are the four black workers involved in this petition. They are frozen in the Labor Department with a top pay expectation of only \$1.895 per hour (A. 72b).<sup>31</sup> All of the white workers are in departments with promotional expectancies leading to substantial pay levels.

***B. It Cannot Be Assumed Without Supporting Evidence That the Continuation of This Prejudicial Requirement Is Related to Duke's Job Performance Needs.***

The aspect of diploma and test requirements that is so appealing and yet so deceptive to employers is a superficially plausible relationship to job performance. The possibility of getting a more "intelligent" employee through use of such devices is often assumed to be a means of get-

<sup>31</sup> The foreman job in the Labor Department pays \$2.505 per hour, but it is not open to non-high school graduates (A. 63b).

ting more productive and more valuable employees. But in the context of industrial jobs, such as those at Duke's Dan River Plant, an immense body of evidence has shown this assumption to be unfounded.

This point has been proven time and again in careful studies by industrial psychologists investigating the "validity" of standard tests such as the Wonderlic and the Bennett in predicting an individual's ability to perform industrial jobs. It has been demonstrated in dozens of studies there is commonly little or no relationship between test scores and job performance. An eminent industrial psychologist, Dr. Edwin Ghiselli of the University of California, recently reviewed all the available data on the predictive power of standardized aptitude tests in an effort to develop better testing practices. Dr. Ghiselli is a strong supporter of tests. Yet he was forced to conclude that in trades and crafts aptitude tests "do not well predict success on the actual jobs,"<sup>32</sup> and that in industrial occupations "the general picture is one of quite limited predictive power."<sup>33</sup> In many situations there is actually a negative relationship between test scores and job success.<sup>34</sup>

What does this mean in practical terms? An example, which is by no means unusual, is contained in a report of a study performed in a large Southern aluminum plant.<sup>35</sup> The study showed that scores on the Wonderlic test had no relation whatsoever to job performance ability. Black

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<sup>32</sup> E. Ghiselli, *The Validity of Occupations Aptitude Tests* 51 (1966).

<sup>33</sup> *Id.* at 57.

<sup>34</sup> *E.g., id.*, at 46.

<sup>35</sup> Mitchell, Albright & McMurry, *Biracial Validation of Selection Procedures in a Large Southern Plant*, in *Proceedings of 76th Annual Convention of the American Psychological Association*, Sept., 1968, reprinted in Appendix hereto at pp. Br. Ap. 6-7, *infra*.



workers were scoring only half as well as whites on the test, but there was no difference between races in job performance ability. If the test had been blindly used, Negroes would have been grossly screened out without business need and contrary to the interests of the employer. Other studies have shown, for example, that the Wonderlic and related tests are of no significant value in predicting performance of ordnance factory workers or radio assembly workers,<sup>36</sup> workers in the printing and publishing industry,<sup>37</sup> and workers in the manufacture of finished lumber products and transportation equipment.<sup>38</sup> As to the Bennett and related tests, studies have shown, for example, that test scores are of no significant value in predicting job success in occupations such as textile weaving<sup>39</sup> and jobs in the manufacture of electrical equipment.<sup>40</sup>

These results should not be surprising. Aptitude tests may be expected to predict future academic performance rather well because grades are measured by performance on more tests. But industrial job performance involves a range of skills and abilities entirely divorced from a pristine test room setting. There is an understandably low correlation between test taking skills and job performance skills.

This is particularly true when the test is being given to a mixed racial group. One of the basic assumptions underlying tests is what might be called the "equal exposure"

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<sup>36</sup> Super and Crites, *Appraising Vocational Fitness* 106 (Rev. ed. 1962).

<sup>37</sup> E. Ghiselli, *The Validity of Occupations Aptitude Tests* 137 (1966).

<sup>38</sup> *Id.* at 135, 148.

<sup>39</sup> *Id.* at 132.

<sup>40</sup> *Id.* at 147.

assumption. Because a test measures how well a person has learned various skills and information, test scores may sometimes make a reasonably useful prediction of performance on the job. But when this equal exposure assumption is false—as it surely is in the case of comparisons between Southern Negroes and whites—the already shaky basis for test predictions is drastically undercut.<sup>41</sup> For this reason, as petitioners' expert witness Dr. Richard Barrett testified he found in his Ford Foundation study, a test may predict differently for one racial group than it does for another (A. 140a).

Of course, tests are not always so poor at predicting. In some cases tests may be reasonably useful. The point is that predicting job performance on the basis of tests or on other measures of educational background is a highly precarious endeavor dependent on a myriad of factors.<sup>42</sup> Be-

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<sup>41</sup> This point was made very clearly by the court in *Hobson v. Hansen*, 269 F. Supp. 401, 484-485 (D.D.C. 1967):

"A crucial assumption [in evaluating aptitude test scores] . . . is that the individual is fairly comparable with the norming group in terms of environmental background and psychological make-up; to the extent the individual is not comparable, the test score may reflect those differences rather than innate differences. . . .

" . . . For this reason, standard aptitude tests are most precise and accurate in their measurements of innate ability when given to white middle class students.

"When standard aptitude tests are given to low-income Negro children, or disadvantaged children, however, the tests are less precise and less accurate—*so much so that test scores become practically meaningless*. Because of the impoverished circumstances that characterize the disadvantaged child, it is virtually impossible to tell whether the test score reflects lack of ability—or simply lack of opportunity. . . ." (Emphasis added.)

<sup>42</sup> See Ghiselli, *The Generalization of Validity*, 12 *Personnel Psychology* 397-398, 400 (1959):

"A confirmed pessimist at best, even I was surprised at the variation in findings concerning a particular test applied to workers on a particular job. We certainly never expect the

cause of the frequency with which test scores show little or no relation to job performance, it cannot be assumed in any particular case that a test is making a useful prediction without supporting evidence. As outlined in the testimony of Dr. Barrett, sound business practice as well as fair employment, calls for an employer to make a careful analysis of the tasks involved in his jobs and to determine what skills and abilities are needed to carry out those tasks. After such an analysis, the employer can select, on the basis of informed judgment and careful study, procedures which will rationally and fairly appraise those skills (A. 125a-129a).<sup>43</sup> Both the EEOC and OFCC Guideline on Selection Procedures, as well as all standard texts on test use insist on such careful study as a prerequisite to using any particular test to deny promotions or jobs.<sup>44</sup> Even the manual

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repetition of an investigation to give the same results as the original. But we never anticipated them to be worlds apart. Yet this appears to be the situation with test validities. . . ."

"... We start off by making the best guesses we can as to which tests are most likely to predict success and are not at all surprised when we are completely wrong."

<sup>43</sup> Even those in the business of selling tests, who might be expected to ease the way for their use, concede the need for such study. See Science Research Assoc., Inc., a subsidiary of IBM, Business and Industrial Education Catalog 1968-69, at 4:

"A sound testing program is based on four critical steps:

1. Careful job analysis.
2. An analysis and assessment of essential job characteristics.
3. Selection of the test or tests.
4. Testing the tests."

<sup>44</sup> EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 at §§1607.4, 1607.5, 1607.7; OFCC, Validation of Tests by Contractors and Subcontractors subject to the Provisions of Executive Order 11246, 33 Fed. Reg. 14392, §§2, 3, 5, (1968).

"Some adequate measure of validity is absolutely necessary before the value of a test can really be known and before the scores on the test can be said to have any meaning as predictors

for the Wonderlic Test, upon which Duke relies, unequivocally states:

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of job success. . . . The use of unverified tests, whether through innocence or intent, cannot be condoned. . . . For example, if a test is known to measure some psychological ability, such as ability to work with mechanical relations, and certain mechanical performances are required in the performance of the job, the test still cannot be considered valid until the scores have been checked against some index of job success." Ghiselli and Brown, *Personnel and Industrial Psychology* 187-88 (1955);

"Tests must always be selected for the particular purpose for which they are to be used; even in similar situations, the same test may not be appropriate. . . . Tests which select supervisors well in one plant prove valueless in another. No list of recommended tests can eliminate the necessity for carefully choosing tests to suit each situation. . . . No matter how complete the test author's research, the person who is developing a selection or classification program must, in the end, confirm for himself the validity of the test in his particular situation. . . . In most predictive uses of tests, the published validity coefficient is no more than a hint as to whether the test is relevant to the tester's decision. He must validate the test in his own school or factory. . . ." 1 Cronbach, *Essentials of Psychological Testing* 86, 105, 119 (2d at 1960).

"It is of utmost importance that any tests that are used, for employment purposes or otherwise be validated. . . . It is only when a test has been demonstrated to have an acceptable degree of validity that it can be used safely with reasonable assurance that it will serve its intended purpose."

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"The point to be emphasized throughout this discussion is that no one—whether he is an employment manager, a psychologist, or anyone else—can predict with certainty which tests will be desirable tests for placement on any particular job." Tiffin and McCormick, *Industrial Psychology* 119, 124 (5th ed. 1965).

See also *e.g.*, Ghiselli and Brown, *supra*, at 210; Ruch, *Psychology and Life* 67, 456-57 (5th ed. 1958); Siegel, *Industrial Psychology* 122 (1962); Thorndike, *Personnel Selection Tests and Measurement Techniques* 5-6 (1949); Freeman, *Theory and Practice of Psychological Testing* 88 (3rd ed. 1962); Lawshe and Balma, *Principles of Personnel Testing* (2nd ed. 1966).

"The examination is not valuable unless it is carefully used, and norms are established *for each situation* in which it is to be applied." (Emphasis added.)<sup>45</sup>

Insofar as a high school diploma requirement is used to measure job performance abilities it is no better than a test and probably much worse. There is so much variation in the quality of high schools, the nature of the courses taken, the grades in the courses and many other factors that a high school diploma is a highly unreliable indicator. In a recent book examining the significance of educational requirements for jobs, Professor Ivar Berg sets out data from a series of studies covering workers in such industries as a Mississippi textile company, a Southern hosiery manufacturing plant, two urban utility companies and an auto assembly plant. Professor Berg also examined the performance of Air Traffic Controllers in detail. The conclusion of every one of these studies was that the formal educational attainments of the workers bore no significant relationship to job success.<sup>46</sup>

In light of the experience derived from years of study with tests, Professor Berg's findings are to be expected. It should be obvious that if a consistent and reliable measure (such as a test) cannot well evaluate job performance potential, an inconsistent and unreliable measure of the same thing (such as a high school diploma requirement) cannot do so.<sup>47</sup> Many companies honestly interested in fair

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<sup>45</sup> Wonderlic Personnel Test Manual 2 (1961).

<sup>46</sup> Education and Jobs: The Great Training Robbery, 87-90, 167-72, (1970), summarized in Berg, Rich Men's Qualifications for Poor Man's Jobs, Trans-Action, Mar. 1969, at 45, 49.

<sup>47</sup> While it is impossible to determine on the record before us what the results might have been of a study at Dan River similar to those conducted by Professor Berg, the evidence suggests that the high school diploma would have been found irrelevant to any

employment have decided, after investigating the matter, that a high school diploma requirement is not worthwhile and should be dropped. This group includes the First National City Bank, Metropolitan Life Insurance Company, American Broadcasting Company and the Chemical Bank New York Trust Company.<sup>48</sup>

It is sometimes suggested that a high school diploma requirement is useful as a measure of motivation and perseverance rather than as a measure of learning. This may be true in some situations involving the selection of new employees and may sometimes justify use of the requirement in such situations (assuming the discrimination inherent in this measure of perseverance is adequately dealt with). In this case, however, Duke has made it clear that the requirement is being used as a measure of learning, not motivation (R. 102a, 188a). This is necessarily so because it would be foolish to attempt to use a high school diploma requirement to assess the motivation and perseverance of employees whose work habits have been observed for several years. This direct in-plant observation enables a far better assessment than any externally based standard.

In view of the low validity and reliability of test and education requirements in assessing job performance abilities, no such requirement that grossly prefers whites over

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job needs there. That has certainly proven to be the case for the white employees working at the company in 1955 when the requirement was adopted. The present average salary level of these whites who happen to have a high school diploma (\$3.41) is not significantly different from those who do not have a diploma (\$3.30) (A. 105b-108b, 126b). This indicates that these non-high school employees have not been significantly impeded by their lack of education in moving into better jobs at Dan River.

<sup>48</sup> Hearings before the United States Equal Employment Opportunity Commission on Discrimination in White Collar Employment, New York City, Jan. 15-18, 1968, at 46-48, 99, 377, 466.

Negroes can be assumed to be based on job performance need unless supported by proper study and evaluation. Absent such study and evaluation, the use of these requirements constitutes an unjustified exclusion of Negroes in violation of Title VII.

***C. Duke Has Made No Study or Analysis or Introduced Any Evidence at All That the Diploma/Test Requirement Is Related to Its Job Performance Needs.***

The arbitrariness of Duke's continued use of the diploma/test requirement is astounding in light of the care and study needed to assure fairness. It is important to remember that this case does not involve a great mass of persons unknown to Duke who must be sorted by some rules of thumb. It involves only four persons, each of whom has worked steadily at the Dan River plant for at least seven years. For a portion of this time before July 2, 1965, they could only serve as laborers under Duke's rigid policy of segregation. During this period of their early manhood they were, in effect, discouraged by Duke from furthering their education by the knowledge that it could not lead to promotion. All four of these men have now served in the job of "semi-skilled laborer" for at least three and a half years (A. 109b, 77b).<sup>49</sup> This job category at Duke involves far more than simple janitorial tasks. As semi-skilled laborers, the petitioners have been required to operate a wide variety of mechanical equipment and machinery, including mowing machines, tractors, lift trucks, jack hammers, air motors, grinders; and make minor repairs to this equipment (A. 65b). These duties are similar in most respects to the duties of men in the Coal Handling Department (A. 49b). In many cases, semi-skilled laborers have

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<sup>49</sup> Willie Griggs and C. E. Purcell, the two blacks most recently promoted to the "semi-skilled laborer" position were moved on Nov. 14, 1966 (A. 77b).

worked with the Coal Handling Department and gained experience and familiarity with the duties there (A. 106a, 124b). Therefore the company is well equipped to evaluate not only the general reliability and performance of these men but also their specific abilities to learn and perform in a context resembling the Coal Handling Department.<sup>50</sup>

The company concedes that many laborers might perform well in Coal Handling if given the chance (A. 124b). This conclusion is confirmed by the fact that eight of twelve men in the Coal Handling Department, including the two foremen and the three senior operators are performing well despite having only a ninth grade education or less (A. 105b-108b, 126b). When ordered by the Court of Appeals to open up Coal Handling jobs and inside jobs to the 6 or 7 black non-high school graduates hired before 1955, Duke willingly acceded to the order without even attempting to cross-petition for certiorari; thus showing that non-high school laborers could feasibly be considered for better jobs.

Yet, despite this overwhelming evidence that a high school diploma is not needed to perform at least some better jobs at Dan River, particularly in the Coal Handling Department, and despite the company's extensive personnel data on the four black laborers hired after 1955, the company continues to insist that these four workers cannot be transferred to *any* better job without meeting the diploma/test requirement. The company claims that it has not even considered whether the qualifications and performance of the four laborers is sufficient to merit promotion (A. 104a).

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<sup>50</sup> Indeed, one of the defined duties of the Labor Department foreman is to "evaluate employees under his supervision for merit reviews and promotions". Defendant's Answer to Interrogatory No. 18, filed Feb. 28, 1967 (Not in printed record).



One would think that in the face of (1) undisputed evidence that the diploma/test requirement is not essential, (2) data showing that the requirement has a seriously racially prejudicial effect, and (3) the knowledge that the burden of this requirement falls only on four long time employees whose status is in some sense a moral responsibility of the company, the persistence of Duke would be based on some compelling reason. What the record indicates, is not a compelling reason but rather a feeble attempt at rationalization.

1. *The High School Diploma Requirement*—The basis on which this requirement is claimed to have been adopted is set out in the testimony of A. C. Theis, Vice-President of Production and Operation for the Duke Power Company. Mr. Theis said that the company found that some of its employees had insufficient ability to be promoted to top level jobs. He then explained:

"This was why we embraced the High School education as a requirement. There is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt this was a reasonable requirement. . . ." (A. 93a).

"I am perfectly willing to admit to you that there are people without a High School education, who are in the Operating jobs, for instance, at Dan River, who have done a satisfactory job. I'm not denying that at all. I can't deny that because we certainly have them there who have done this job, who have been there for over ten years. I don't think there is anything magic about a High School education. . . ." (A. 103a-104a).

This explanation could be repeated by any company in the world. It shows nothing more than a whim, a blind hope without any study, evaluation or analysis. The company did not determine that lack of education was the disabling factor for its unsuccessful employees. The company made no formal job evaluation study, and prepared no summaries of duties required on jobs or analysis of the qualifications needed to do those jobs (A. 19b, 57b-71b, 109-110a).<sup>61</sup>

Petitioners are quite willing to concede that there may conceivably be some jobs at Duke for which the diploma/test requirement is relevant, although that remains to be proven. But it is equally clear that there are many jobs in the better departments, particularly in Coal Handling, where the requirement is unlikely to be of any relevance to job performance. Duke's decision to apply the requirement

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<sup>61</sup> The Court of Appeals was incorrect in asserting that Duke's expert witness, Dr. Moffie, had "concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skill classifications." 420 F.2d 1233. This finding, if accurate, would certainly go to the question of job-relatedness. However, it is based on the misreading of Dr. Moffie's testimony. He said only that "the assumption is" that the educational requirement is job related, not that he had verified or even supported the assumption (A. 181a). This is understandable since Dr. Moffie did not participate in establishing the high school requirement in the mid-1950's (A. 177a) and was never asked to ratify it. He was qualified as an expert only in "Industrial and Personnel Testing" (A. 164a) and was asked on direct examination to testify only to the appropriateness of the tests used by Duke (R. 162a-175a). As to the high school requirement, he clearly deferred to the company:

"Q. [to Dr. Moffie] Would the High School education by itself tell you whether an employee has the ability or trainability for a job at a higher level?

A. [by Dr. Moffie] A High School education would merely tell you that you have the necessary abilities as defined by a High School education, and if the company feels that this is required in these jobs, that's all it would tell you" (A. 188a).

across the board to all jobs in all formerly white-only departments, without any study or evaluation, is an arbitrary action with a serious racially discriminatory impact.

Nor can these requirements stand as a reasonable attempt by Duke to upgrade its work force and obtain employees who will be able to move through progression lines to top level jobs, as the court below suggested. For one thing, we are dealing here with four existing employees who are already part of the work force and will remain so. A company does not upgrade its force by underutilizing existing employees; it does so when it hires new employees. Second, Duke has not shown the requirements to be relevant to even the highest level jobs in the plant and therefore the requirements have not been justified as job-related even to future promotional possibilities. Finally, and most important, the employment and promotion situation at Dan Rivers is very static. Duke's witnesses described Dan River as "a real stable employment situation" (A. 65a). No new employees were hired from 1965 to 1967 (the period covered by interrogatories up to trial) (A. 74b); and there were no transfers of employees to other plants during this period (A. 77b, 83b). Only 19 promotions were made within the plant in this two year period (A. 77b, 83b), an average rate of one promotion every ten years for each of the 95 men in the plant. This is hardly a situation where employees must be frozen out of middle level jobs which they can perform for fear that they will soon be knocking at the door of jobs which may be beyond their capabilities.<sup>52</sup>

If Duke were permitted to adopt a high school diploma requirement on the flimsy basis set out on this record, any employer in the country would also be absolutely free to

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<sup>52</sup> If such a situation did occur, Duke could, of course, be free to deny promotion to that upper level job.

adopt such a requirement or some other educational requirement which would have the same effect of grossly preferring whites over Negroes.

2. *The Test Requirement*—The situation regarding the tests is even less justifiable than that regarding the high school diploma requirement. The claimed basis for this was also set out by Mr. Theis. On July 2, 1965, the effective date of Title VII the company had introduced the Wonderlic and Bennett tests as a hurdle which all new employees were required to pass.<sup>53</sup> For some time, white employees in the Coal Handling Department who were not high school graduates had been seeking an alternative means of transferring to an "inside" job (A. 85a-86a). Mr. Theis explained:

"I seized on these tests as being a possible way that I could free up these men who were blocked off. . . ." (A. 86a).

"In fact, that's what made me select these 2 tests—to offer them an opportunity to be qualified, because the white employees that happened to be in Coal Handling at the time, were requesting some way that they could get from Coal Handling into the Plant jobs. . . ." (A. 199a-200a).

Here again there was no job evaluation or other study or analysis. No attempt to validate the tests was made. (A. 115b). The tests were simply "seized" as a convenient way of helping out a group of whites.

This is not because Duke is unfamiliar with the need for study and validation of tests. They have retained an in-

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<sup>53</sup> The legality of this requirement for new employees is not in issue in this case. However, the timing of the adoption of the test requirement and its well known discriminatory impact on Negroes raises a good deal of suspicion.

dustrial psychologist to do a validation study of tests throughout Duke's system (A. 115b-116b). However, he has been unable to validate the tests so far even though he has completed at least one study on 100 to 200 people (A. 179a). He is having the common experience of being unable to produce a correlation between test scores and job performance abilities.

Because it is so clearly the case, Duke apparently concedes that its tests do not necessarily predict job performance and the court below found that they were not job related. Rather, Duke seems to take the position that the test is used in place of the high school diploma and is valid as a substitute therefor (A. 180a-182a). Since the need for a high school diploma is based on no study or evidence, and is therefore unlawful, a test which measures the same thing and admittedly has not been related to job performance can hardly stand.

Because neither the high school diploma requirement nor the test requirement is supported by any study, evaluation or validation which shows that it is justified by Duke's job performance needs, the gross discriminatory impact on Negro incumbents cannot be ignored. The use of either requirement tends to deprive Negroes of promotional opportunity in violation of Title VII.

### III.

#### **Duke's Discriminatory Practices Derive No Protection From Section 703(h) of Title VII.**

The educational and test requirements at Dan River constitute an unlawful racial discrimination as explained at length above. Since these requirements tend to prefer whites over blacks, by three to one, it is discrimination with a vengeance. Duke nonetheless attempts to obtain some protection for this discrimination under section 703(h), 42 U.S.C. §2000e-2(h). This defense has no merit.

Section 703(h) provides that an employer is free:

"to give and to act upon the results of any *professionally developed* ability test provided that such test, its administration or action upon the results is *not designed, intended or used* to discriminate because of race . . ." (Emphasis added).

It should first be noted that this provision applies only to tests. It has no applicability whatsoever to the high school diploma requirement. As to Duke's test requirement, this section could have some relevance; but Duke's tests fail to meet the requirements of this provision and therefore derive no protection from it.

First, Duke's test use is not "*professionally developed*" as required by section 703(h) because professional standards require, as a prerequisite to test use, study and evaluation which Duke did not undertake. See, pp. 31-39, *supra*. Duke would apparently read the term "*professionally developed*" to mean that any test developed by professionals at its inception could be administered in any employment situation. This would permit, for example, use of a typing test to select ditchdiggers or the use of the College Boards

to select janitors. The EEOC, in its Guidelines on Employment Testing Procedures, has ruled more reasonably that:

"The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII." (A 130 b).

Duke's test use fails to meet this standard.

Second, an "*intent*" to screen out blacks is at least a part of Duke's intention in using its tests. This can be inferred from the timing of the decision to install tests, the lack of study that went into it, and Duke's persistence in maintaining the tests. To summarize the facts on this point, in 1965, shortly after Federal law first required Duke to drop its overt racial discrimination, tests were put in to modify the high school diploma requirement in response to pressure from whites in the Coal Handling Department who wanted to transfer and who could not meet it. See p. 17 *supra*. Instead of lowering the requirement or waiving it for long-time employees, which would have permitted many blacks to qualify for transfer, the company seized on the alternative of a test that continues to relate to educational and cultural background. The company knew that the burden of this requirement fell primarily on blacks in the Labor Department. In March of 1966, these blacks expressly complained to company officials about the unfair impact of the test (A. 120b). The company was surely aware of the notoriously poorer performance of blacks on these tests.

Yet the company made no attempt to equate the situation of blacks in the Labor Department with that of whites in the better departments who were being exempted from the high school and test requirements. It did not make any study or investigation to determine whether the tests were job-related, i.e., whether they fulfilled genuine business needs. The company has conceded that it really has no definite information about the efficacy or validity of the tests (A. 179a). The only thing that Duke could have known for certain about its tests was that they had a highly adverse impact on black workers. Taking account of Duke's long history of segregation and discrimination, the conclusion is inescapable that the discriminatory impact of the tests was in the minds of Duke's managers and formed at least part of Duke's intent in 1965.

Third, whatever Duke's intent, there is no question that the tests are in fact "used" to discriminate against black workers. Such is the clear result of using tests which apply primarily to blacks in the plant while effectively exempting whites, and it is the clear result of using tests to measure educational attainment when such is not relevant to job performance needs.

To the extent that any of these three points is correct, Duke's test use is outside the protective scope of section 703(h). It should not be at all surprising that section 703(h) does not protect a test use such as that at Dan River. If section 703(h) were read as Duke proposes it would give virtually *carte blanche* to any employer to use tests to effectively create gross preferences in favor of whites. The legislative history demonstrates that it was not intended to have any such significance.

The test clause in section 703(h) was introduced by Senator John Tower as an express response to a decision



of a hearing examiner under the Illinois Fair Employment Practices Act in a case involving the Motorola Corporation. 110 Cong. Rec. 9024-42 (1964). This decision, handed down while Title VII was on its way through Congress, indicated that the use of any test having an adverse impact on blacks might be unlawful *per se*, without regard to the question of job performance needs. Decision and Order of FEPC Hearing Examiner, reprinted in 110 Cong. Rec. 9030-9033 (1964).<sup>54</sup> This is obviously not the theory being advanced by petitioners before this Court insofar as it ignored the question of job performance. As Senator Tower correctly pointed out, this ruling established a "double standard" and might require the hiring of Negroes who were unqualified for a job.

Senator Tower therefore introduced an extensive amendment to Title VII which he explained as "not an effort to weaken the bill" but rather to protect the right of an employer to assess an applicant's "job qualifications." 110 Cong. Rec. 13492 (1964). Senator Tower made it clear that his amendment "would not legalize discriminatory tests." *Id.* at 13504. He said he sought to protect only tests "designed to determine or predict whether [an] individual is suitable or trainable with respect to his employment in the particular business or enterprise involved," *Id.* at 13492, thus indicating adherence to a job-relatedness standard. The sponsors of Title VII were of the view that the bill as it stood already protected employers against a decision such as *Motorola* because of differences between Title VII and the Illinois law. Moreover, they objected to Senator Tower's amendment because it was loosely worded and could read to give an employer an absolute right to use a professionally designed test even if it oper-

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<sup>54</sup> See 110 Cong. Rec. 9024 (1964), quoting editorial in Chicago Tribune, March 7, 1964, critical of the Motorola decision.

ated discriminatorily. Remarks of Senators Case and Humphrey, *Id.* at 13503-04. For these reasons, Senator Tower's extensive amendment was rejected by the Senate. *Id.* at 13505. Subsequently, Senator Tower introduced a much abbreviated and watered-down version of his amendment which had been cleared with proponents of the bill. 110 Cong. Rec. 13724 (1964). Senator Humphrey, a sponsor of the bill, said:

"Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be *in accord with the intent and purpose of that title.*" *Id.* at 13724. (Emphasis added).

The amendment passed on voice vote without debate and is now included in section 703(h).

This history demonstrates that the test clause, like so many other special provisions in section 703,<sup>55</sup> was designed to have no more than clarifying effect. Moreover, since the original, and presumably more permissive, version of Senator Tower's amendment intended to include a job-relatedness requirement for tests, it is reasonable to imply such a requirement in the less permissive version that was enacted.<sup>56</sup>

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<sup>55</sup> Cf. Section 703(f) and (g) and other parts of 703(h) of Title VII.

<sup>56</sup> Senator Humphrey reached this conclusion in a letter to the American Psychological Association, stating flatly that section 703(h) did not permit tests that were "irrelevant to the actual job requirements." Letter to American Psychological Ass'n (no date given), quoted in *The Ind. Psychologist* (Div. 14, Am. Psychological Ass'n. Newsletter), Aug. 1965, at 6.

## CONCLUSION

The essence of the issue in this case is whether employers may be licensed to give employment preferences of three, or more, to one to white workers over black. The Court of Appeals decision, which authorized diploma and test requirements absent an affirmative showing of racial animus, in effect granted that license. The petitioners submit that this interpretation of Title VII renders the law powerless to combat the growth of irrelevant requirements having a serious racially prejudicial impact. It is inconsistent with the entire thrust and purpose of this landmark legislation. The decision below should be reversed and remanded, with directions to apply a job relatedness standard consistent with the rulings and interpretations

of the Equal Employment Opportunity Commission and to  
award petitioners a reasonable attorneys' fee.

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## BRIEF APPENDIX

MEMORANDUM FOR THE RECORD

TO : THE SECRETARY OF THE ARMY

FROM : THE CHIEF OF STAFF

SUBJECT: [Illegible]

1. [Illegible]

2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

6. [Illegible]

7. [Illegible]

8. [Illegible]

9. [Illegible]

10. [Illegible]

11. [Illegible]

12. [Illegible]

13. [Illegible]

14. [Illegible]

15. [Illegible]

16. [Illegible]

17. [Illegible]

18. [Illegible]

19. [Illegible]

20. [Illegible]

# Decision of EEOC, December 2, 1966, reprinted CCH, Employment Practice Guide, ¶17,304.53

Number 38-49  
3-47

## Decisions and Rulings

7413-27

### ¶17,304.53 Discriminatory testing procedures.

Decision of Equal Employment Opportunity Commission, December 2, 1966.

Reasonable cause existed to support conclusion that employer's testing procedures discriminated on the basis of race where the criteria used were not related to the successful performance of jobs for which the tests were given and only one of 17 Negroes taking the tests for advancement from "dead-end" jobs to "line of progression" jobs passed. In plants with a history of discrimination, testing procedures will be carefully scrutinized, and the burden is on the employer to show that tests are not used to exclude Negroes from job opportunities.

Back references—¶1209, 16,904.

On August 24, 1966, the Commission adopted *Guidelines on Employment Testing Procedures* [¶16,904]. In light of the *Guidelines*, the Commission concludes that reasonable cause exists to believe that Respondent's testing procedures are in violation of Title VII of the Act.

The following facts are undisputed. Respondent employs approximately 2,465 persons in its Paper Mill and Converter Plants. . . . While Negroes constitute approximately 40% of [the local] population, they constitute 6% of Respondent's work force. Commencing in 1958 Respondent has administered various tests to applicants for employment. From the beginning of 1957 through April 1964 Respondent hired 386 whites and 12 Negroes; of the Converter plant employees hired since then, between April 1964 and November 1965, 75 are white and 4 are Negro.

Most of the jobs at Respondent's plant are in lines of progression, which means that an employee moves up from a lower paying job on the bottom to a higher paying job on the top in accordance with seniority, if able to perform the work. Most of the remaining jobs, which involve less skilled and more menial work, are lower paying "dead-end" jobs with no prospect of advancement. Of the white employees in the Converter operation, 797 (82%) are in line of progression jobs while 177 (18%) are in dead-end jobs. Of the Negro employees in the Converter operation, 8 (8%) are in line of progression jobs while 89 (92%) are in dead-end jobs. In 1964 Respondent commenced administering tests to employees desiring to move from dead-end jobs to line of progression jobs or from one line of progression to another. Employees who were in line of progression jobs were not required to take the tests to keep their jobs or to be promoted within lines of progression. Since 1964, 94 white employees and 17 Negro employees have taken the transfer tests. Of these, 58 whites (58%) and one Negro (6%) passed. The one Negro who passed was outbid for the job he was seeking by a higher seniority white.

It is significant that until 1963, shortly before the transfer tests were instituted, Respondent maintained segregated jobs and lines of progression, so that Negroes were categorically excluded on the basis of their race from the more skilled and better paying jobs which were reserved for "whites only." While the bars are no longer expressly in terms of race, it is plain that Respondent's testing procedures have had the effect of continuing the restriction on the entrance of Negro employees into "white" line of progression jobs.

We stated in our *Guidelines*: "If the facts indicate that an employer has discriminated in the past on the basis of race . . . the use of tests in such circumstances will be scrutinized carefully by the Commission." Accordingly, where, as here, the employer has a history of excluding Negroes from employment and from the better jobs because of their race, and where, as here, the employer now utilizes employment tests which function to exclude Negroes from employment opportunities, it is incumbent upon the employer to show affirmatively that the tests themselves and the method of their application are non-discriminatory within the meaning of Title VII.

Title VII permits employers to use ability tests which are "professionally developed" and which are not "designed, intended or used" to discriminate. As we have stated in our *Guidelines*, to be considered as "professionally developed," not only must the tests in question be devised by a person or firm in the business or profession of developing employment tests, but in addition, the tests must be developed and applied in accordance with the accepted standards of the testing profession. Relevant here are the requirements that the tests used be structured in terms of the skills required on the specific jobs in question and that the tests be validated for those specific jobs. In other words, before basing personnel actions on test results, it must have been determined that those who pass the tests have a greater chance for success on the particular jobs in question than those

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who fail. Moreover, where the work force, or substantial work force, is multiracial, the tests should be validated accordingly.

In the instant case, all prospective Company and employees are required to pass the Otis Employment Test IA or IB. Applicants for jobs "requiring mechanical ability" are also required to pass the Bennett Test of Mechanical Comprehension Form AA and PPI Numerical Test A or B. For transfer, employees are required to pass or have passed one or more of the above tests plus the Wonderlic Personnel Tests Form A. The Otis and Wonderlic tests measure "general intelligence," with particular loading on verbal facility; the PPI test measures skill in arithmetic; the Bennett test measures knowledge of physical principles. There is nothing in the voluminous materials submitted by Respondent to indicate that the traits measured by these tests are traits which are necessary for the successful performance of the specific jobs available at Respondent's plant. Nor does

it appear that any of the tests have been validated properly in terms of the specific jobs available at Respondent's plant, or in terms of the racial composition of Respondent's plant. In the absence of evidence that the tests are properly related to the jobs and have been properly validated, Respondent has no rational basis for believing that employees and applicants who pass the tests will make more successful employees than those who fail; conversely, Respondent has no rational basis for believing that employees and applicants who fail the tests would not make successful employees. Respondent's testing procedures, therefore, are not "professionally developed." Accordingly, since Respondent's testing procedures serve to perpetuate the same pattern of racial discrimination which respondent maintained overtly for many years before it began testing, we conclude that there is reasonable cause to believe that Respondent, thereby, has violated and continues to violate Title VII of the Civil Rights Act of 1964.

[F 17,304.54] Failure to advance Negro employees to higher rated jobs on basis of seniority.

Decision of Equal Employment Opportunity Commission, Case Nos. 5-11-2650, 6-3-2703-40-3-2723, November 19, 1966

Reasonable cause exists to believe that a steel corporation has violated Title VII by maintaining an exclusively Negro job classification within the maintenance-of-way department, by transferring whites from other departments to fill higher rated jobs within the department, and by refusing to provide a training program which would enable Negroes to advance to higher-rated jobs within the department.

Back reference.—[F 1217]

Reasonable cause does not exist to believe that a union violated Title VII by refusing to process the grievance of a Negro member. Investigation revealed that the grievance was processed orally, that it was denied, that the union member was notified of the denial, and that he failed to appeal within ten days as required by the collective bargaining agreement.

Back reference.—[F 1217]

#### Summary of Charges

The Charging Parties allege discrimination on the basis of race (Negro) as follows:

(a) Charging Parties work in the Rail Transportation Division, Maintenance of Way Department, of the United States Steel Corporation. There is little or no opportunity for advancement for Negroes in their current seniority unit. In addition, several white men with less seniority were brought into the Department to fill higher rated jobs. Respondent hires men from

other departments rather than letting the Negroes exercise their seniority rights within the Department.

(b) On the charge, Charging Party Speed accuses Local Union 1733 of United Steelworkers of America as Respondent with respect to the above matter, in that the Union failed to process the grievance.

#### Summary of Investigation

(a) The investigation substantiates the allegations of the Charging Parties that

<sup>1</sup> According to *Standards for Educational and Psychological Tests and Manuals* published by the American Psychological Association (1950), tests should be revalidated at least every 15

years. The Otis tests were revised in 1932, the Bennett in 1940, the Wonderlic in 1962 and the PPI in 1960.

F 17,304.54

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# Decision of EEOC, December 6, 1966, reprinted CCH, Employment Practice Guide, ¶17,304.55

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the Respondent is discriminating against the Charging Parties by continuing to maintain a job classification which is exclusively Negro.

The Maintenance of Way Department (hereinafter referred to as MOW) is a portion of the bargaining unit represented by Local 1733 of the United Steelworkers of America. This same local represents most of the employees in the Mechanical Shops Department. MOW is a seniority unit with approximately 130 job opportunities. Only 18 of these job opportunities are above JC-4 and in a Line of Promotion.

The Charging Parties are classified as Track Laborers. Historically and currently, this is an all-Negro classification. This classification contains 112 of the 130 job opportunities in MOW. Since 1950, there has been but one addition to the Track Laborer Seniority Roster, and this was a Negro, a Mr. William Mathews, who was added in September of 1965.

Prior to April of 1966, personnel actions within MOW were virtually static:

(1) In 1959-1960 three (3) men (white) were brought into the Department to work at unskilled jobs that senior Negroes could have qualified for.

(2) In April of 1966, an expert welder (white) was brought into the Department from the Regional Pool to work as a Track Welder.

(3) In May of 1966, another Tin Mill employee (white) was drawn from the Regional Pool, this time for the job of Signal Repairman.

The Track Laborer job classification provides no training opportunities. Fourteen of the 18 job opportunities above the Track Laborer job have special training requirements. At best, you have approximately 100 men vying for four job opportunities. The Charging Parties can not aspire to anything other than a JC-4 Track Laborer position. The low ratio of higher graded jobs to the JC-4 job, and the low level of personnel turnovers in MOW contribute to the persistence of the Charging Parties' predicament.

(b) The investigation does not substantiate the allegations that were filed against Union Local 1733 by Charging Party Eugene Speed.

Mr. Speed alleged failure of the union to process a grievance he filed. After investigation, it was determined that Mr. Speed's grievance was processed verbally (grievances are not reduced to writing until the third step), that it was denied and dropped at a lower step, and that Mr. Speed was notified of this fact and failed to appeal the action within 10 days as stipulated by contract. His grievance, therefore, was not processed further.

### Decision

(a) Reasonable cause exists to believe that the Respondent company is violating Title VII of the Civil Rights Act of 1964 as alleged.

(b) Reasonable cause does not exist to believe that Local 1733 of the United Steelworkers of America is violating Title VII of the Civil Rights Act of 1964 as alleged.

¶17,304.55 Employment tests found to be unrelated to job content are deemed discriminatory.

Decision of Equal Employment Opportunity Commission, December 6, 1966.

Reasonable cause exists to believe that a food processing plant has violated Title VII by administering an intelligence test which is not related to job requirements in order to restrict the number of Negro employees and by refusing to hire Negro job applicants solely because they were unable to pass the discriminatory test.

Back references.—¶1209, 1217.

### Summary of Charges

The Charging Parties allege discrimination because of race, as follows: After Negro applicants had qualified for employment by passing a dexterity test (GATH), they have subsequently been systematically excluded by the Respondent through the use of an intelligence test (Wonderlic). Negroes who have been able to pass the intelligence test have sometimes not been

employed, and white applicants have been hired either without testing or when they have applied at later dates than qualified Negro applicants. The change in standards for employment works to the disadvantage of Negroes in the community because of low educational attainment. In addition, the Respondent's use of the local state employment service office for initial screening of applicants results in disadvantage due to

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traditional discriminatory practices by that facility—where Negro applicants may not sit where they encounter rudeness and odors of domestic work instead of industrial work, and where they suffer delayed referrals or are refused referrals to industrial employment.

Charging Parties and the local CORE chapter (on behalf of Negro citizens) contend that Respondent utilizes certain methods to avoid hiring substantial numbers of Negroes. Furthermore, they allege that the company and the local power structure have agreed to limit the number of Negro women to be hired, to avoid disturbing the domestic work force.

#### Summary of Investigation

1. The Respondent's facility for processing poultry for frozen and canned food products received widespread publicity prior to opening in June, 1966. As early as the summer of 1965 applicants at the state employment office requested referrals to the company; screening tests began in the winter of 1965. As of October 6, 1966, Respondent had hired 1,011 persons, including 176 Negroes, classified as follows: 124 unskilled and 19 semiskilled workers, 18 service workers, 8 skilled workers, 3 technicians, and 2 clerical workers. Several hundred job opportunities are expected to materialize and be filled within the next few months as the plant operation achieves full production. The majority of jobs available fall into the category of unskilled work involved in dressing, cooking, and packaging poultry.

2. Investigation disclosed that selection processes used by Respondent have lent themselves to discriminatory practices.

a. *Application Evaluation*: Initial screening of more than 6,000 applications eliminated immediately those with less than eight years' school, erratic or inappropriate work histories, over 50 years of age, and incomplete applications; in addition, preference was given those with industrial work experience. All criteria were not rigidly adhered to, in that some past 50 and a few with less than eight years' school were employed. About 1,500 applications were rejected; nearly three-quarters of these were from Negro applicants, with schooling a major factor. Negroes comprise nearly one-half of the population in the county, and more than half in neighboring counties, but of those over 25 years of age who did not complete eight years of school in Sumter, 62 per cent are Negro. Eight years of schooling is no more valid an indicator of

job qualifications than is a passing score on the intelligence test such as the Wonderlic.

b. *Physical Examination*: No detailed examination was made of medical records. However, investigation disclosed that there may be a slight disadvantage for Negro applicants because of the large proportion of rejections for medical reasons.

c. *Reference Checks*: Reference checks, which are not required in writing, are a major stumbling block, and often barrier, to many Negro applicants inasmuch as some employers (especially private households and farmers) are reluctant to lose this source of low-paid labor. Of those Negroes already hired, at least one-half were formerly domestics, paid at the rate of \$3.50 per day.

d. *Manual Dexterity Testing*: At least 40 percent of the females referred by the state employment office were Negroes who had passed the GATR finger and manual dexterity testing. One technical irregularity in the use of this test was noted in that one critical score of the GATR B-238 series (validated for poultry laborers) was not being used. Section IV of the Manual for the USES General Aptitude Test Battery, published by the Department of Labor (1966), sets forth finger dexterity (F) and manual dexterity (M) factors as important aptitudes in the selection of poultry-dressing workers (D. O. T. Code 525.667). An earlier (1962) version of Section III of the *Guide to the Use of the GATR* also refers to aptitudes F and M. The correlation between these aptitudes and supervisory ratings of current employees was 0.53. This validity coefficient is moderately high and is quite adequate for the prediction of applicants' subsequent performance on the job.

Neither the *Dictionary of Occupational Titles* (D. O. T.) nor the GATR Manual contain any information to substantiate the notion that general intelligence, verbal ability, numerical ability, or spatial ability are required for the performance of this kind of unskilled work. Since the Wonderlic Personal Test is heavily loaded with the verbal, numerical, and abstract reasoning components of "general intelligence," its content is irrelevant to job content and employee performance among poultry-dressing workers.

e. *Intelligence Testing*: One month after hiring began, Respondent introduced the Wonderlic test. A trial with the Wonderlic had been conducted during the spring; Negro and white personnel who failed to

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achieve qualifying scores in this early testing were hired despite the results and have proved to be satisfactory employees. Respondent personnel who administer the Wonderlic have no training for or experience with testing; they use for guidance a small booklet accompanying the test. They have arbitrarily subtracted more than one point from the score designated by publishers of the test as the national norm for persons completing eight years of school. A certain number of irregularities in test administration and scoring were noted, in that a number of records revealed questionable scoring and improper grading, as well as alterations on test papers. Respondent contends these were clerical errors.

3. Seldom will there be independent evidence that Respondent intended its educational and testing requirements to eliminate a disproportionate number of Negro job applicants, but it is elementary that a person must be held to intend the normal and foreseeable consequences of his actions. If Respondent did not anticipate the results of its screening procedures, it is certainly aware of them now. This is not to suggest that in all circumstances it is improper for an employer to utilize selection devices which may incidentally reject a disproportionate number of Negro applicants, but where, as here, the educational and testing criteria have the effect of discriminating and are not related to job performance, there is reasonable cause to believe that Respondent, by utilizing such devices, thereby violates Title VII.

4. Nine of the 30 Charging Parties are included among 2,000 applicants awaiting consideration since June 1966, when hiring is done, the Respondent states that applications are selected from the file in a "random" fashion and with no attempt to hire in the sequence in which people had applied. This does not explain why only 17 per cent of the current employees are Negro, whereas 40 per cent of the applicants referred by the Employment Security Commission as being qualified are Negro.

Negroes account for nearly one-half the population in the county where the plant is located, and more than 60 per cent in counties to the South and East and 65 per cent in the county to the North. Despite this, a pattern of rigid segregation persists in the area.

5. The majority of the jobs to be filled require no special skills. Those classified as skilled maintenance jobs do require that the applicant read and write. The Respondent is using job descriptions developed for operations in similar plants at other locations until such can be written for this facility.

6. Inspection of the plant revealed that Negro employees were not segregated within working areas, and there were no signs of differential treatment with respect to any plant facilities. Some jobs appear to be dominated by one sex, but this does not appear to result from any claim for a bona fide occupational qualification. Female employees were observed to operate forklift trucks, a non-traditional assignment. However, male and female employees are assigned separate series of clock numbers, and personnel records are segregated by sex.

#### Decision

Reasonable cause exists to believe the Respondent has violated Sections 703(a)(1) and (2) of the Civil Rights Act of 1964, as follows:

1. It has failed to hire charging parties and others similarly situated, because of race, by arbitrarily and discriminatorily setting educational standards that are not justified for the jobs sought, as a means of restricting the number of its Negro employees; and

2. It has limited the selection of its employees in a way that tends to deprive the charging parties and others of employment opportunities, because of race, by the discriminatory use of testing procedures which are not exempted by Section 703(b).

## BIRACIAL VALIDATION OF SELECTION PROCEDURES IN A LARGE SOUTHERN PLANT

M. D. MITCHELL, L. E. ALBRIGHT, and F. D. McMURRY  
Kaiser Aluminum & Chemical Corporation Management & Personnel Services, Inc.

This study, conducted at a large Southern industrial plant, is one phase of a multiplant investigation of personnel selection practices within the corporation. The major aim of this particular study was to determine whether tests and other objective selection procedures in use are culturally fair and valid for predicting job success. Other aspects of the overall project will be devoted to a general review of the quality and sequencing of all phases of the selection process, including employment interviews, physical examinations, and reference inquiries. In addition, procedures for upgrading or promotion of present employees will be scrutinized and revised if necessary to assure equal opportunities for all qualified employees.

### METHOD

**Subjects.** In the study to be reported here, data from the personnel records of nearly 1,600 male hourly workers and 3,200 applicants at a New Orleans, Louisiana, plant were examined. The majority of these men were semi-skilled workers, either employed or applying for positions in one large department of the plant engaged in processing powdered alumina into molten metal. Working conditions are difficult because of the high temperatures required for the production process. Consequently, turnover is high. Of the 1,594 employed Ss, 361 had terminated, most within 2 mo. of employment. The remainder of the Ss had been employed from 3 mo. to 8 yr. or more.

**Criteria.** The 361 terminées were compared with selected samples of the present employees with at least 3 mo. of service to ascertain whether the turnover-prone individuals could have been identified at the time of hiring. In addition to turnover, overall job performance evaluations by supervisors of the present employees were utilized as a criterion in the study. For work groups of 5 men or more, the alternation ranking method was employed, with at least 2 supervisors ranking each man. Stanine ratings were used for groups smaller than 5. Ratings and rankings were converted to 7 scores with a mean of 50 and a standard deviation of 10.

To assure uniformity and understanding of rating instructions, meetings were held with all supervisors so that the procedures could be explained and demonstrated. The evaluations were made by the supervisors individually during these meetings and were collected as the men left the room.

**Predictors.** The predictor data consisted of the Wonderlic Personnel Test and biographical items extracted from the company's application form. In all, 24 variables were analyzed including age, amount of education, race, marital status, number of dependents, etc.

**Procedure.** Separate, but similar, analyses were conducted for the performance and tenure criteria. The biographical items were analyzed using the Lawshe-Baker procedure (1950) against both criteria. Subsamples of the available Ss were used to develop the item weights, with the

remaining Ss held out for cross-validation. A scoring key of 12 items was developed for the tenure criterion using validation samples of 200 terminated and 132 Ss who had remained 3 mo. or more and were still employed. An item analysis against the performance ratings was not sufficiently promising to warrant cross-validation.

Intercorrelations of the Wonderlic scores, biographical items, and criteria were computed, as well as stepwise multiple regression equations against the performance rating criterion (the dichotomous nature of the tenure criterion precluded this latter analysis). Any suspected nonlinear relationships were plotted graphically and inspected (none were found). Where appropriate, separate analyses were performed for Negroes and whites.

### RESULTS

**Negro-white comparisons.** Data for 3,200 applicants, gathered from October 1966 to October 1967, indicated that the proportion of Negro applicants who failed to meet the minimum score of 12 on the Wonderlic was precisely twice that of the white applicants (705/1312 or 54% of Negro applicants compared to 520/1899 or 27% of white applicants). Subsequent analyses for the employed workers showed that for neither whites nor Negroes was the Wonderlic valid against either performance ( $r = -.01$  for 830 whites and  $-.02$  for 194 Negroes) or tenure ( $r$  not computed but inspection of the scores revealed no essential difference). As would be expected, the employed whites had a significantly higher mean Wonderlic score than the Negroes (20.0 vs. 16.4,  $t = 5.77$ ,  $p < .01$ ).

Interestingly enough, there was no significant difference in the performance ratings for the two groups ( $M$  for whites = 50.6,  $SD = 8.1$ ; for Negroes  $M = 49.4$ ,  $SD = 7.1$ ,  $t$  not significant), thereby easing concern that a group of predominantly Southern white supervisors might be biased in their evaluation of Negro workers. There was some tendency, in addition, for Negroes to stay longer on the job (39% stayed 3 mo. or longer vs. 33% of the whites) although the difference was not significant.

**Interrater agreement.** As noted previously, 2 supervisors ranked or rated each employee whenever possible. Kendall's coefficient of concordance was computed on the multiple rankings for a random sample of 66 employees and found to be .77, significant at the .01 level; this finding would seem to support the inference that a careful rating job was done.

**Prediction of performance.** Despite their reliability, the performance ratings were not significantly related to the biographical items or to the Wonderlic for whites or Negroes or for whites and Negroes combined.

**Prediction of tenure.** Although the Wonderlic was not found to be predictive of turnover, a scoring key of 12 biographical items was developed and cross-validated. These items included race, keyed in favor of Negroes; age, keyed

in favor of older applicants, marital status, favoring married applicants, etc.

The scoring key composed of these 12 items was cross-validated with the results shown in Table 1. A phi coefficient computed from these data was .30,  $\chi^2 = 22.50$ , significant beyond the .01 level.

TABLE 1  
Cross-Validation of Tenure Scores for  
Terminated and Still Employed Groups

Score	Terminated		Still employed		Total	
	No.	%	No.	%	No.	%
Less than 12	99	53	13	18	112	44
12-15	43	23	27	38	70	27
16 or More	44	24	31	44	75	29
Total	186	100	71	100	257	100

### DISCUSSION

With the lack of positive results in predicting performance and the finding that the Wonderlic had been screening out a disproportionate number of Negroes, it was decided to revise the entire selection process. The changes were as follows:

1. The Wonderlic has been dropped and the SRA General Reasoning Test has been introduced into the entire process, on an experimental basis only. No selec-

tion decisions will be made on the basis of this test until it has been validated.

2. A biographical inventory has been introduced into the selection process on an experimental basis. Hopefully, it can provide further aid in reducing turnover and in future performance studies.

3. The selection process has been altered to include an interview and a more comprehensive orientation session. The changes follow a long period of almost total reliance on test scores to select employees from a large group of applicants.

4. The "tenure key" developed in the study will be used in the selection process for hourly employees until experimental data can provide an improved version.

These changes in one plant's selection process are typical of those which will probably be necessary for a number of other plants. Hopefully, they will contribute to a fairer and more valid set of procedures for all applicants. To the extent that the situations and findings of this study may be representative of the "state of the art" of personnel selection, the investigators would urge other employers to scrutinize their selection practices in light of the current requirements to provide equal opportunity for all applicants.

### REFERENCE

- Lawshe, C. H., & Baker, P. C. These aids in the evaluation of the significance of the difference between percentages. *Educational and Psychological Measurement*, 1950, 10, 263-270.

## RULES AND REGULATIONS

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## § 135g.3 Hydrocortisone.

A tolerance is established for negligible residues of hydrocortisone (as hydrocortisone sodium succinate or hydrocortisone acetate) in milk at 10 parts per billion.

## § 135g.25 Neomycin.

Tolerances are established for residues of neomycin in food as follows: 0.25 part per million (negligible residue) in edible tissues of calves; and 0.15 part per million (negligible residue) in milk.

## § 135g.66 Polymyxin B.

A tolerance is established for negligible residues of polymyxin B in milk at 2 units per milliliter.

## § 135g.67 Methylprednisolone.

A tolerance is established for negligible residues of methylprednisolone in milk at 10 parts per billion.

3. Part 121 is amended by deleting § 121.1003 *Neomycin, polymyxin* . . . and § 121.1104 *Neomycin*.

Any person who will be adversely affected by the foregoing order may at any time within 30 days after its date of publication in the *FEDERAL REGISTER* file with the Hearing Clerk, Department of Health, Education, and Welfare, Room 6-62, 5600 Fishers Lane, Rockville, Md. 20852, written objections thereto in triplicate. Objections shall show wherein the person filing will be adversely affected by the order and specify with particularity the provisions of the order deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought. Objections may be accompanied by a memorandum or brief in support thereof.

**Effective date.** This order shall become effective on its date of publication in the *FEDERAL REGISTER*.

(Sec. 512(i), 82 Stat. 347; 21 U.S.C. 360b(i))

Dated: July 23, 1970.

CHARLES C. EDWARDS,  
Commissioner of Food and Drugs.

(P.R. Doc. 70-9567. Filed July 31, 1970. 8:47 a.m.)

## PART 135e—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

## PART 135g—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

## Dichlorvos

The Commissioner of Food and Drugs has evaluated a new animal drug application (40-846V) filed by Shell Chemical Co., Agricultural Chemical Division, 110 West 51st Street, New York, N.Y. 10020, proposing the safe and effective use of dichlorvos as an anthelmintic in swine feed. The application is approved. Based

upon an evaluation of the data before him, the Commissioner concludes that a tolerance is required to assure that edible tissues of swine treated with dichlorvos are safe for human consumption.

Therefore, pursuant to provisions of the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347; 21 U.S.C. 360b(i)) and under authority delegated to the Commissioner (21 CFR 2.120), a new section is added to Part 135e and another to Part 135g, as follows.

## § 135e.51 Dichlorvos.

(a) Chemical name. 2,2-Dichlorovinyl dimethyl phosphate.

(b) Approvals. (1) Premix level 9.8 percent granted to Shell Chemical Co.,

Agricultural Chemical Division, 110 West 51st Street, New York, N.Y. 10020.

(c) Assay limits. Finished feed must contain 85-135 percent of the stated amount of dichlorvos.

(d) Special considerations. Do not mix into feeds that are to be pelleted. Do not mix with pelleted feed. Feed must be maintained and fed dry. Feed may use any drug, insecticide, pesticide, or chemical having cholinesterase-inhibiting activity either simultaneously or within a few days before or after worming animals with the feed.

(e) Related tolerances in edible products. See § 135g.75.

(f) Conditions of use. It is used as follows:

Amount	Limitations	Indication for use
1. Dichlorvos . . . 0.007%	For swine up to 70 pounds body weight, feed as sole ration for 2 consecutive days. For swine from 70 pounds to market weight, feed as sole ration at the rate of 4.5 pounds of feed per head until the medicated feed has been consumed. For hogs, open or bred sows, and sows, feed as sole ration at the rate of 4.2 pounds per head per day for 2 consecutive days.	For the control and control of ticks, lice, mites, and other parasites of the swine. For the control of ticks, lice, mites, and other parasites of the swine. (Precaution: Do not use on pregnant sows.)
2. Dichlorvos . . . 0.007%	For hogs, open or bred sows, and sows, feed as sole ration at the rate of 6 pounds per head for one feeding.	Do.

## § 135g.75 Dichlorvos.

A tolerance of 0.1 part per million is established for negligible residues of dichlorvos (2,2-dichlorovinyl dimethyl phosphate) in the edible tissues of swine.

**Effective date.** This order is effective upon publication in the *FEDERAL REGISTER*. (Sec. 512(i), 82 Stat. 347; 21 U.S.C. 360b(i))

Dated: July 23, 1970.

SAM D. FINE,  
Associate Commissioner  
for Compliance.

(P.R. Doc. 70-9567. Filed July 31, 1970. 8:46 a.m.)

## Title 29—LABOR

## Chapter XIV—Equal Employment Opportunity Commission

## PART 1607—GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

By virtue of the authority vested in it by section 713 of title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e-12, 78 Stat. 265, the Equal Employment Opportunity Commission hereby issues Title 29, Chapter XIV, § 1607 of the Code of Federal Regulations.

These Guidelines on Employee Selection Procedures supersede and enlarge upon the Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission on August 24, 1966. Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Sec.  
1607.1 Statement of purpose.  
1607.2 "To" defined.  
1607.3 Discrimination defined.

Sec.  
1607.4 Evidence of validity.  
1607.5 Minimum standards for validation.  
1607.6 Presentation of validity evidence.  
1607.7 Use of other validity studies.  
1607.8 Assumption of validity.  
1607.9 Continued useful tests.  
1607.10 Employment agencies and employment services.  
1607.11 Disparate treatment.  
1607.12 Retesting.  
1607.13 Other selection techniques.  
1607.14 Affirmative action.

**AUTHORITY:** The provisions of this Part 1607 issued under Sec. 713, 78 Stat. 265, 42 U.S.C. sec. 2000e-12.

## § 1607.1 Statement of purpose.

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of non-discriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination and with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test scores and a marked increase in doubtful scoring practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for persons protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

Under the guidelines in this part are designed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (b) of section 703 allows such persons to have and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

**[1607.2 "Test" defined.]**

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part are designed to measure ability tests, which are designed to measure ability for the test for promotion, membership, training, referral or retention. This definition includes, but is not limited to, measures of knowledge, aptitude, mental and physical abilities, personality, and coordination, knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The

term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability, including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

**[1607.3 Discrimination defined.]**

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination, unless: (a) the test has been validated and evidences a high degree of utility as hereinafter defined, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

**[1607.4 Evidence of validity.]**

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate [1607.3]. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so clearly established, or the time upon entry into higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion

in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multunit organization, evidence of validity specific to each unit may not be required. Provided, That no significant differences exist between units, jobs, and applicant populations.

**[1607.5 Minimum standards for validation.]**

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW, Washington, D.C. 20036. Evidence of content or construct validity, as defined in that publication, may be appropriate where criterion validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently



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included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9.) A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

#### § 1607.6 Presentation of validity evidence.

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

#### § 1607.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any pertinent evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

#### § 1607.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

#### § 1607.9 Continued use of tests.

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in process validation procedures which are designed to produce within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend his cutoff scores so that score ranges broad enough to permit this identification of criterion-related validity will be obtained.

#### § 1607.10 Employment agencies and employment services.

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make significant or employee appraisal, or referrals based on the results obtained from any psychological test or other selection method



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not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concept of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 Retesting.

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to "failure" candidates who have waived themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment pro-

cedure claims more education or experience, that individual should be retested.

§ 1607.13 Other selection techniques.

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and un-scored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 Affirmative action.

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

The guidelines in this part are effective upon publication in the FEDERAL REGISTER.

Signed at Washington, D.C., 21st day of July 1970.

[SEAL] WILLIAM H. BROWN III,  
Chairman.

[F.R. Doc. 70-9062; Filed, July 31, 1970;  
8:40 a.m.]

## Title 30—MINERAL RESOURCES

Chapter III—Board of Mine Operations Appeals, Department of the Interior

### MAINE HEALTH AND SAFETY; APPEALS

In F.R. Doc. 70-3769 appearing in the issue for Saturday, March 28, 1970, on page 5255, there was established in Title 30, Code of Federal Regulations, a new Chapter III, Part 300 thereof described the organization and jurisdiction of the Board of Mine Operations Appeals to perform the review functions of the Sec-

retary of the Interior under the Federal Coal Mine Health and Safety Act of 1969. This Board shall also be authorized to perform the review functions of the Secretary under the Federal Metal and Nonmetallic Mine Safety Act of 1966. For this reason, Part 300 is hereby amended by substituting therefor a new Part 300, reading as set forth below, to include these functions. Also, a new Part 302, as set forth below, describing the Board's procedures under the Federal Metal and Nonmetallic Mine Safety Act, is hereby added to Chapter III. New Parts 300 and 302 shall become effective upon their publication in the FEDERAL REGISTER.

WALTER J. HICKEL,  
Secretary of the Interior.

JULY 30, 1970.

### PART 300—ORGANIZATION

Sec.  
300.1 Jurisdiction.  
300.2 Power of Secretary.  
300.3 Constituency and Decisions of Board.

**ACTUATOR:** The provisions of this Part 300 issued pursuant to sec. 302, Public Law 91-173; 83 Stat. 803; and sec. 9, Public Law 89-577; 80 Stat. 777; 80 U.S.C. 728.

#### § 300.1 Jurisdiction.

(a) The Board of Mine Operations Appeals, under the direction of a Board Chairman, is authorized to exercise, pursuant to regulations published in the FEDERAL REGISTER, the authority of the Secretary under the Federal Coal Mine Health and Safety Act of 1969 pertaining to:

(1) Applications for review of withdrawal orders; notices fixing a time for abatement of violations of mandatory health or safety standards; discharge or acts of discrimination for invoking rights under the Act, and entitlement of miners to compensation;

(2) Assessment of civil penalties for violation of mandatory health or safety standards or other provisions of the Act;

(3) Applications for temporary relief in appropriate cases;

(4) Petitions for modification of mandatory safety standards;

(5) Appeals from orders and decisions of hearing examiners; and

(6) All other appeals and review procedures cognizable by the Secretary under the Act.

(b) The Board is authorized to exercise, pursuant to regulations published in the FEDERAL REGISTER, the authority of the Secretary under the Federal Metal and Nonmetallic Mine Safety Act of 1966 to review withdrawal orders.

(c) In the exercise of the foregoing functions the Board is authorized to cause investigations to be made, order hearings, and issue orders and notices as deemed appropriate to secure the just and prompt determination of all proceedings. Decisions of the Board on all matters within its jurisdiction shall be final for the Department.

#### § 300.2 Power of Secretary.

Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by the aforesaid Acts or by other law.

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Supreme Court, U.S.

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E. ROBERT SEAVER, CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

No. **1405** **124**

WILLIE S. GRIGGS, et al.,  
*against* Appellants,

DUKE POWER COMPANY, a Corporation,  
Appellee.

**BRIEF OF THE ATTORNEY GENERAL OF THE STATE  
OF NEW YORK AS AMICUS CURIAE IN SUPPORT  
OF REVERSAL**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

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No. 1405

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WILLIE S. GRIGGS, et al.,

Appellants,

*against*

DUKE POWER COMPANY, a Corporation,

Appellee.

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**BRIEF OF THE ATTORNEY GENERAL OF THE STATE  
OF NEW YORK AS AMICUS CURIAE IN SUPPORT  
OF REVERSAL**

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**Interest of the Amicus**

The State of New York, in 1945, was the first State to enact a fair employment practices law addressed to the elimination and prevention of discrimination in employment based on race, creed, color or national origin.<sup>1</sup> The New York anti-discrimination laws<sup>2</sup> are based on the con-

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<sup>1</sup> New York Laws of 1945, Chap. 118.

<sup>2</sup> New York Executive Law §§ 290-301.

viction that practices of discrimination because of race, creed, national origin, or sex undermine the institutions and foundation of a free democratic state and menace the peace, order, and general welfare of the state and its inhabitants.

New York State has also endeavored to afford its inhabitants equal opportunity in employment by its efforts to insure that individuals seeking admission to apprentice training programs shall have their qualifications appraised solely according to objective criteria which permit review.<sup>3</sup>

More recently, however, it has become increasingly apparent that though the era of overt racial discrimination may be near an end, more subtle and sophisticated modes of excluding racial minorities have emerged to threaten progress toward equal opportunity. In the wake of recently enacted federal and state laws barring overt discrimination in employment there is an increasing resort to the use of objective employment criteria which, however, include unnecessary, non-job-related requirements. The use of these irrelevant standards has the same prejudicial effect as past overt discriminatory practices in denying equal opportunity to members of minority groups.

In order to effectuate the purposes of New York's anti-discrimination laws and to prevent such laws from being rendered ineffective, the Attorney General and the New York State Division of Human Rights have sought to eliminate hiring, promotional, and union admission standards which have no valid relation to job requirements and which operate to disqualify members of minority

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<sup>3</sup> New York Executive Law § 296 subd. 1-a; see also *State Commission on Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup. Ct. 1964).



groups because of the effects of past discrimination and current cultural and socio-economic patterns.<sup>4</sup>

Consistent with the basic purpose of the 1964 Civil Rights Act, the federal Equal Employment Opportunity Commission has also required that employment standards pertaining to hiring, transfer or promotion must be significantly related to performance on the job.

The instant case presents an issue of great significance in its potential impact on the struggle of minority groups for equality of opportunity. The issue is no less than whether the employment provisions of the 1964 Civil Rights Act are to be read as providing an employer with a virtual *carte blanche* to adopt any educational and test requirements regardless of how irrelevant to the job they may be and regardless of how they may operate to the disadvantage of minority groups, or whether the provisions are to be interpreted in the light of the basic anti-discriminatory purpose of Title VII and construed so as to effectuate rather than undercut such purposes.

The decision below by the Fourth Circuit Court of Appeals casts doubt as to the future effectiveness of the 1964 Civil Rights Act in the elimination of employment discrimination. The New York State Attorney General believes that the outcome of this litigation cannot fail but be so pervasive in its effect as to have an impact even on state efforts to eliminate artificial barriers in the way of

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<sup>4</sup>*Lefkowitz v. Kerr*, Case C-15335 (New York State Division of Human Rights, unreported 1967) in which a three year residency requirement for admission to the New York City steamfitters apprenticeship program was stricken as not being job-related. See also *Lefkowitz v. Marks*, Case C-15939 (N. Y. SDHR unreported 1968), in which a two year math requirement and the use of "bonus points" for academic high school courses were stricken as not being related to the work requirements of the apprenticeship program of the Westchester-Fairfield County Electricians Joint Apprenticeship Committee and, therefore, not a valid "objective criterion."

equal opportunity. The ability to use tests without requiring that they be shown to be a reasonable measure of the ability required to perform in the particular job which the applicant seeks would open the door for many employers and labor unions to circumvent Federal and State anti-discrimination laws by adopting tests which screen out a disproportionate number of persons of minority groups who may nevertheless be fully qualified to perform the actual job. Similarly, if formal educational requirements may be imposed in situations where the relationship of such requirements to satisfactory job performance is unknown to the employer, then the way will be clear to discriminate against Negroes and other groups on the basis of racial disadvantages created by past educational discrimination.

It is in recognition of the challenge posed by this case to the potency and effectiveness of the fair employment provisions of our own quite similar anti-discrimination law, that the Attorney General of the State of New York files this brief in support of the petitioners in accordance with Rule 42 of this Court.

### **Question Presented**

Is an employer's use of psychological tests and high school equivalency requirements as employment criteria prohibited by Title VII of the 1964 Civil Rights Act when such criteria (A) operate to exclude a great proportion of Negroes from jobs for which they may be well qualified while having a relatively minor exclusionary effect upon whites, and (B) bear no relation to the requirements for satisfactory performance in a particular job or class of jobs?

### **Statement of the Case**

This is an appeal from a judgment of the United States Court of Appeals, Fourth Circuit, decided January 9, 1970,

which affirmed in part and reversed in part, a decision of the United States District Court for the Middle District of North Carolina dismissing a complaint on the merits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e, *et seq.*

The appellants herein, Negro employees of Duke Power Company, at its Dan River Steam Station, filed a complaint, on March 15, 1966, with the Equal Employment Opportunity Commission charging that the company was discriminating against them on the basis of race.

After investigation, the Commission found reasonable cause to believe that the company was in violation of Title VII of the Civil Rights Act of 1964 and notified each plaintiff of his right to sue under § 706(e).

Thereafter, a class action was brought in the District Court challenging the validity of the company's transfer and promotion system under Title VII of the Civil Rights Act of 1964.

Appellants alleged that Duke's transfer and promotion system, which requires a high school education or satisfactory scores on general intelligence tests in order to transfer from its "outside" jobs in the plant, constitutes an improper and discriminatory employment practice effectively denying them equal opportunity in employment.

The District Court in a Memorandum Opinion, 292 F. Supp. 243, dismissed the complaint holding that the high school education requirement does not discriminate against Negro employees on the basis of race, and that the tests used by appellee are professionally developed ability tests within the meaning of section 703(h) of Title VII.

The United States Court of Appeals Fourth Circuit reversed the District Court as to its holding that Negroes hired before 1955 (when the high school requirement was

instituted) were not entitled to injunctive relief, but affirmed as to all Negro employees hired after the 1955 requirement was adopted. *Griggs v. Duke Power Co.*, 420 F. 2d 1225 (4th Cir. 1970).

The Duke Power Company operates a generating plant at Draper, North Carolina, known as the Dan River Steam Station. The work force at the plant is divided into five departments: Operations, Maintenance, Laboratory and Test, Coal Handling, and Labor Departments. Until 1966 the practice of Duke was to relegate all its Negro employees to the Labor Department which consists of janitorial and maintenance services, where the maximum wage is less than the minimum paid to any white employee. Duke's high school education and alternative testing requirements are now imposed on the all Black Labor Department as a condition for transfer even to coal-handling, the other "outside" department where the work consists of unloading, crushing, weighing and carrying coal.

## POINT I

**Duke's educational and testing criteria are unlawful because they are based on racial characteristics while lacking any business justification rooted in a relationship to the demands of the work to be performed.**

### **A. The discriminatory impact of these superficially neutral educational and testing standards.**

Duke's transfer requirements are racially discriminatory in two important respects. First, beneath the facade of even-handedness the requirements will be seen to operate as a double standard based on race. Second, even if the criteria applied to *all* employees they would nevertheless be unlawful because they are based on racial characteristics and are without business justification.

### 1. *Duke's double standard based on race.*

Duke's employment criteria apply only to those employees in so-called "outside" jobs who are seeking to transfer to the better, higher paying "inside" jobs and to those in the all black labor department seeking promotion to the other two "outside" departments, coal handling and watchmen. Employees who were in "inside" jobs before the requirements were imposed are exempt from meeting them either as a condition of retaining their job or as a prerequisite to further advancement. Of course all current employees who were in "inside" jobs prior to 1955 when the high school requirement was first imposed are white. Such is the case because Duke overtly discriminated on the basis of race, relegating Negroes to the Labor Department up until 1966. While it is true that some whites are subject to the transfer requirements, it is clear that the disadvantage is borne primarily by Negroes. It is they who find themselves today in the lowest paying Labor Department rather than in "inside" jobs because of their race and Duke's past discriminatory practices. It is they who must meet the requirements even to transfer to the other two "outside" departments. No white must meet the requirement to transfer out of the Labor Department because there are no whites in the Labor Department. Until recently it has been an employee's racial status which has determined departmental placement and progression. By instituting transfer requirements for certain departments and granting exemptions to others Duke is in fact placing its white employees in a superior position. It has granted a preference to those in inside department—a preference available on the basis of race since Negroes were in the past precluded from inside jobs.

Title VII § 703(a) (2), 42 U.S.C. § 2000 e-2(a) 2, makes it an unlawful employment practice for an employer—

*“to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any indi-*

*vidual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, . . .*" (Emphasis supplied)

We do not here assert that the provisions of Title VII retroactively apply to Duke's practices before July 2, 1965, the effective date of the Act. But, to the extent that Duke's present employment criteria classify Negroes adversely because of the inferior position they occupied during past years of overt discrimination, they are clearly prohibited by the Act. *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968). The Act prohibits Duke from relying upon the very racial disadvantage it created by its past discrimination in order to perpetuate the consequences of its past discriminatory practices. *Quarles, id.*

In *Quarles*, restrictive departmental transfer and seniority provisions were considered by the Court. At issue there, as in the instant case, was whether such provisions "are unlawful employment practices because they are superimposed on a departmental structure that was organized on a racially segregated basis." *Quarles* at page 510. As to the question whether present consequences of past discrimination are covered by the Act, the Court answered in the affirmative:

"The plain language of the act condemns as an unfair practice all racial discrimination affecting employment without excluding present discrimination that originated in seniority systems devised before the effective date of the act." *Quarles* at page 515.

Duke has here accorded to certain departments exemption from its educational and testing criteria. Those who entered the exempt departments before the criteria were imposed did so at a time when the opportunity was racially restricted. May Duke now effectively preserve the

past discriminatory pattern by imposing standards which place greater burdens on Negroes? In *Quarles*, Judge Butzner answered unequivocally in language apposite to the instant situation:

“It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.”  
279 F. Supp. at 516.

The *Quarles* decision was expressly followed by Judge Heebe in *United States v. Local 189*, 282 F. Supp. 39 (E. D. La. 1968), where he held that a job seniority system (not unlike the one involved *Quarles* in its result) violated Title VII because it “perpetrates the consequences of past discrimination.” Accord *Hicks v. Crown Zellerbach Corp.*, 58 Lab. Cas., para. 9145 (E. D. La. 1968); *Dobbins v. IBEW*, 292 F. Supp. 413 (S. D. Ohio 1968). See also *Fogler v. McCarty Inc.*, 294 F. Supp. 368 (E. D. La. 1967), aff’d 407 F. 2d 1047 (5th Cir. 1968).

Duke’s transfer requirements are analogous in their invidious effects upon Negroes to other practices in civil rights contexts which have been stricken down by the Courts. Perhaps the paradigm example is the use of the so-called Grandfather Clause to grant a preference to white voters—the law was unanimously overturned by this Court in *Guinn v. United States*, 238 U. S. 347. More recently a neutrally phrased transfer plan which would have perpetuated school segregation by vitiating the effects of school rezoning was overturned by this Court without dissent. *Goss v. Bd. of Education*, 373 U. S. 683, 83 Sup. Ct. 1405. See also *Lane v. Wilson*, 307 U. S. 268; *United States v. Dogan*, 314 F. 2d 767 (5th Cir. 1963); *Ross v. Dyer*, 312 F. 2d 191 (5th Cir. 1963).

## **2. The unlawful use of criteria based on racial characteristics.**

We have so far contended that Duke's transfer requirements constitute an unlawful double standard insofar as they do not apply to all employees but grant an exemption and thereby give preference to white employees on the basis of a status unavailable to Negroes due to racially discriminatory practices prior to the effective date of Title VII. But, even if these criteria were imposed upon all employees without exception, they would violate Title VII because they lack business justification. Duke has never shown how or why a high school education is needed for unloading, crushing, or carrying coal—the actual demands of jobs in the coal handling department. To impose such a requirement in the absence of such a showing is to prefer whites over Negroes without business necessity. The preferential effect is easily demonstrated. As of the 1960 census only 12% of North Carolina Negro males had completed high school whereas 34% of North Carolina white males had done so. Against this background it can be seen that the imposition of the educational requirement creates an almost 3 to 1 preference for whites—a preference bottomed on race.

Performance on generalized "intelligence" or "aptitude" tests such as the standardized tests used by Duke is today recognized to be closely related to educational and cultural background. See e.g. *Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967), *aff'd sub. nom.*, *Smuck v. Hobson*, 408 F. 2d 175 (D. C. Cir. 1969 *en banc*); *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. C. Mass. 1969).<sup>5</sup> Moreover, in areas where Negroes have been most deprived of educational and cul-

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<sup>5</sup> See Generally Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws, A General Approach to Objective Criteria of the Hiring and Promotion*, 82 Harv. L. Rev. 1598 (June 1969) [hereinafter cited as Cooper and Sobel].



tural opportunity the disparity between average white score and average Negro score is greatest. In one instance, 58% of whites passed a battery of standardized tests while only 6% of blacks passed. (The Wonderlic and Bennett tests employed by Duke herein were among the tests included.) Decision of EEOC, cited in CCH Empl. Prac. Guide, para. 1209.25 (Dec. 2, 1966).

It is clear from the foregoing that Duke's educational and testing requirements have an adverse impact on Negroes because of their race. But this fact in itself might not, without more, constitute a violation of Title VII. Rather it is the racially discriminatory impact of these criteria coupled with the fact that they are unrelated to the demands of the job to be performed which renders them invalid under Title VII. Such criteria can not be justified by business necessity.

**B. The need for a relation between the criteria and satisfactory job performance.**

It is well settled that employment practices fair in form but discriminatory in substance are proscribed by Title VII. Superficially "neutral" standards which favor whites but do not serve business needs cannot stand. *Quarles v. Phillip Morris, supra*; *Local 189 v. United States*, 416 F. 2d 980 (5th Cir. 1969); *Local 53 of International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969).

Duke's standards might serve business needs if they could reasonably predict future performance in the job. Thus, for example, an employer may properly give a stenographic or typing test to measure ability and likely future performance of applicants for secretarial positions. Such a test would be proper and lawful even if, due to past disadvantages, certain minority groups fared poorly on it. But may an employer use such a test to hire

janitors where the test operated to exclude more Negro applicants than whites?

The standardized general intelligence tests administered by Duke clearly are not so obviously related to the demands of its jobs as a typing skills test is related to the job of a typist. The Wonderlic Personnel Test, one of the two tests challenged herein, includes arithmetic, vocabulary and verbal reasoning questions<sup>6</sup> which may measure an applicant's formal educational achievement without predicting his job performance in an industrial situation. A noted industrial psychologist specializing in aptitude testing, Dr. Edwin Ghiselli of the University of California, reviewed the evidence concerning whether standardized aptitude tests can predict job performance and felt compelled to conclude that as to trades and crafts the aptitude tests "do not well predict success on the actual job" and in industrial settings "the general picture is one of quite limited predictive power".<sup>7</sup> This conclusion has been underscored by many studies of the predictive value of intelligence tests scores.<sup>8</sup> One such study, conducted in a large aluminum plant in the south showed that although Negroes scored only half as well as whites on the Wonderlic Test they performed just as well as whites on the job.<sup>9</sup> The implications of the foregoing example are clearly apposite here: Duke's use of the Wonderlic and Bennett tests is screening out Negroes without business necessity.

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<sup>6</sup> E. Wonderlic, Wonderlic Personnel Test Form I (1959).

<sup>7</sup> E. Ghiselli, *The Validity of Occupational Aptitude Tests*, 51, 57 (1966).

<sup>8</sup> See Cooper and Sobol, *supra*, note 5, 1643-1646.

<sup>9</sup> Mitchell, Albright & McMurry, *Biracial Validation of Selection Procedures in a Large Southern Plant*, in *Proceedings of the 76th Annual Convention of the American Psychological Ass'n* (1968), at 575.

The need then is for proper study before deciding what tests or other standards should be used and then evaluating the results obtained in the light of the employee population and its performance on the jobs. Since Duke admittedly has not undertaken to "validate" the tests it uses, it is merely speculating as to their efficacy and simply hoping that they will be related to business needs. But even the manual for the Wonderlic Test used by Duke unequivocally states:

"the examination is not valuable unless it is carefully used, and norms are established for each situation in which it is to be applied."<sup>10</sup>

The Equal Opportunity Commission which is responsible for the administration and implementation of Title VII has insisted that standards imposed as conditions for transfer must be *job-related* in order to be valid. The EEOC has ruled that tests are unlawful " \* \* in the absence of evidence that the tests are related to specific jobs and have been properly validated \* \* \*." Decision of EEOC, Dec. 2, 1966, reprinted in CCH, Employment Practices Guide, para. 17, 304-53. Two federal district courts have supported this position. *United States v. H. K. Porter*, 296 F. Supp. 40 at 78 (N. D. Ala. 1968); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S. D. Ohio 1968).

The Commission's position that job-relatedness is a *sine qua non* of any valid employment testing standards is the only interpretation of 703(h) which is compatible with, and which gives affect to 703(a). Any other construction of 703(h) opens the way for gross evasions of the statute. The Circuit Court's rejection of job-relatedness as a criterion of validity enables any employer to create job preferences in favor of whites. An employer may easily achieve such a discriminatory effect by adopting criteria

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<sup>10</sup> Wonderlic Personnel Test Manual 2 (1961).

which are based on cultural and educational differences caused by a history of deprivation even when such criteria are irrelevant to the question of whether a job can be adequately done.

For further reasons discussed in Point II below, the Circuit Court's rejection of the Commission's position was unwarranted. Nevertheless, while not requiring Duke's educational and testing criteria to be job-related in order to be valid, the Circuit Court did seem concerned with whether the criteria served business needs. It was satisfied in this regard by Duke's assertion that the transfer requirements were instituted in response to the growing complexity of its business, and that the standards were adopted to determine whether an employee has sufficient intelligence to enable him to be promoted upward toward supervisory positions. Duke pointed out that it has long had the policy of training and promoting its own employees into supervisory positions.

As to such alleged business necessity, it should first be noted that it is improper for Duke to adopt standards addressed to only a few supervisory positions which only a relatively small number of employees may eventually rise to. Most employees will not become supervisors. It is manifest therefore that Duke has no justification for excluding Negroes from jobs for which they are qualified simply because there are a few higher, supervisory jobs for which they may not be qualified.

The Office of Federal Contract Compliance dealt with this problem in its administration of Executive Order 11,246, 3 C.F.R. 339 (1964-69 com.) which prohibits discrimination by government contractors. That agency requires that when a hiring test is based on possible promotion to other jobs, promotion must not be a remote possibility but must be probable "within a reasonable period of time and in a great majority of cases" 33 Fed. Reg. 14392, § 2(b) (1) (1968).

Secondly, quite compelling evidence against Duke's claim of business necessity is that the Company is quite willing to retain and promote many white employees who have not met these educational and testing standards.

The third and most important reason why Duke's claim of business necessity should be rejected is that it is ultimately based on the idea that although these tests are not related to the particular job the employee is now seeking, they are valid as to a position he may eventually rise to. But job-relatedness has not been shown even as to such higher level positions.<sup>11</sup> Indeed, Duke has not demonstrated that its educational and testing requirements are relevant as to any job. They were adopted without proper study and evaluation. Duke's hope that these criteria will help in selecting more capable employees for middle and higher level jobs is not grounded in any meaningful study of the relevance or validity of these standards as to such jobs. Duke's standards have never been related to performance in any of the jobs in the Company. The Company's assertion that the educational and testing criteria serve business needs is therefore mere speculation. Discriminatory standards cannot be upheld when they stand on such a weak foundation.

## POINT II

**Duke's use of discriminatory, non-job-related employment criteria derives no protection from § 703-h of Title VII.**

The testing provision of Title VII of the Civil Rights Act of 1964 provides that "any professionally developed ability test" the results of which are acted upon by an

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<sup>11</sup> Testing to predict successful job performance in higher positions is subject to the same shortcomings as is testing for low level jobs. See E. Ghiselli, *supra*, note 7, at 34-36, 49-51.

employer is lawful if "its administration or action upon the results is not designed, intended or used to discriminate because of race." 42 U.S.C. § 2000e-2(h). As interpreted by the Fourth Circuit, the clause permits the use of any professionally created test, provided it is not designed or intended to discriminate. *Griggs v. Duke Power Co.*, 420 F. 2d 1225 (4th Cir. 1970). We support appellants' contention that this interpretation is in error.

The phrase "professionally developed" may refer to any type of test, from general intelligence to specific learned skills. The crucial inquiry, is whether the tests are put to the purpose for which they were created. There would be little business sense in asking agricultural laborers to demonstrate through test performance the same level of verbal ability as editorial assistants. "Using aptitude tests to determine eligibility for employment or the order of hiring is certainly justified if there is a relationship between the aptitude tested and the demands of the work to be performed." *Arrington v. Mass. Bay Transportation Authority*, 306 F. Supp. 1355 (D. C. Mass. 1969). But the use of non-job-related criteria, when it results in the disqualification of a greater number of minority-group persons, deprives both employers and the community of potential talent. Business needs are not served, and the results of such exclusion serve to unlawfully perpetuate past discrimination. *United States v. Sheet Metal Workers*, 416 F. 2d 123 (8th Cir. 1969); *Local 53 Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969).

An essential clarification of the term "professionally developed" as the phrase appears in § 703(h) is contained in an Equal Employment Opportunity Commission release: *Guidelines on Employment Testing*, CCH, Employment Practices Guide, para. 16,904 (1966). The Commission there interprets a "professionally developed ability test" as one which "fairly measures the knowledge or skills required by the particular job or class of jobs.

The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII." An additional recommendation in the *Guidelines* suggests that testing be viewed as but one component of the total evaluation of a potential employee, particularly "when an applicant has not enjoyed equal educational opportunities." It is urged that these *Guidelines* should be accepted by this Court. The lower courts' rejection of the Commission's *Guidelines* is contrary to established judicial principles. Commission *Guidelines* have been accorded great weight in cases arising from Title VII's prohibition against discrimination because of sex or religion. *Dewey v. Reynolds Metal Co.*, 304 F. Supp. 116 (D. C. Mich. 1969); *Weeks v. Southern Bell Telephone Co.*, 408 F. 2d 228 (5th Cir. 1969). This Court has determined that in similar situations, "when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U. S. 1, 16 (1965).

The majority of the Circuit Court claimed to have relied upon the legislative history as a factor in its consideration of the weight to be given to the EEOC's Guidelines and the proper meaning to be accorded § 703h. Debate over testing reflects the Senate's preference for a business necessity standard for employment testing. In response to a decision by the Illinois Fair Employment Practice Commission, *Myart v. Motorola*,<sup>12</sup> Senators Clark and Case issued a memorandum examining the impact of Title VII on testing. *Motorola* had been interpreted as invalidating any test which resulted in the exclusion of more Blacks than Whites. Responding to this conception, Clark and

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<sup>12</sup> Decided on February 26, 1964. The decision is reproduced in 110 Cong. Rec. 5662-64 (1964).

Case found "no requirement . . . that employers abandon *bona fide qualification tests* where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups." (Emphasis supplied) 110 Cong Rec. 7213 (1964). "Business need" and qualifications both entail a selection process which promotes the most talented in terms of job-related skills. It can be seen therefore that Senate discussion of ability testing assumed a business necessity and qualification approach.

The testing amendment, 703(h) is the final outcome of the debate generated by *Motorola*. Senator Tower sponsored it to make it clear that the extreme implications of *Motorola* would not be incorporated into Title VII. Senator Tower's first proposal introduced the standard of whether the test could "determine or predict whether . . . [an] individual is suitable or trainable with respect to his employment in the particular . . . enterprise." 110 Cong. Rec. 13492. The impact of the amendment was that a fair test examining an employee's ability to perform a job would not be struck under Title VII. We believe this amendment would have provided a fair clarification of the role of testing consistent with the spirit of the law. However, the amendment as written was rejected as redundant. 110 Cong. Rec. 13505. Senator Tower then submitted a shorter version, this time omitting the earlier specific reference to business needs or qualifications. This later amendment passed with the support of the floor leader, Senator Humphrey, who said "Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be *in accord with the intent and purpose of that title*." 110 Cong. Rec. 13724 (1964) (Emphasis supplied). 110 Cong. Rec. 13505. Clearly implied in the clause is the business necessity standard referred to by both Tower's original amendment and the Clark-Case memo-



randum. The final clause reflects the concern of its supporters that the act must not be read as barring *fair tests* to assess *job qualifications*.

The Court below, in rejecting this view of legislative history, added that the defeat of a more explicit amendment in 1968 supported its position. That proposal, calling for a standard of direct job-relation, was only a small part of a larger bill which would have granted the EEOC the authority to issue judicially enforceable cease and desist orders.<sup>13</sup>

As Congress declined to enhance the powers of the Commission, the Bill was not enacted. The legislative history of 703(h) then indicates a legitimate concern that employers be permitted to obtain qualified employees, capable of doing the job through the use of fair testing.

To be held unlawful under Title VII, a test must be "designed, intended or *used to discriminate*" (emphasis supplied). The requisite "intent" as contemplated by this statute may be inferred from the act of knowingly administering a test, or setting a requirement, unrelated to the demands of the job, which has the effect of excluding a minority group. It cannot be doubted that Duke has knowingly and voluntarily adopted the criteria here in question, that it is aware that the standards operate to exclude a disproportionate number of Negroes, and that it admits to having adopted the standards without studying whether they were related to the jobs. Such conduct is "intentional" within the meaning of the act. *United States v. H. K. Porter Co.*, 296 F. Supp. 40, 115 (N. D. Ala. 1968); *Clark v. American Marine Corp.*, 304 F. Supp. 603 (E. D. La. 1969); *See also Local 189 Papermakers v. United States*, 416 F. 2d 980 (5th Cir. 1969); *Dobbins v. Local 212 IBEW*, 292 F. Supp. 413, 443 (S. D. Ohio 1968).

<sup>13</sup> See S. 3465 90th Cong., 2d Sess. § 6(c) (1968).

Moreover, what ever the company's intent, it cannot be questioned that the tests are in fact *used* to discriminate and therefore proscribed by Section 703(h).

Duke's transfer requirements therefore violate § 703(h) in three important respects: (1) they are not "professionally developed" within the meaning of the Act, (2) they are intended as a means of discriminating on the basis of race, and (3) they are "used to discriminate because of race". If the Court is persuaded as to any one of above then Duke's criteria should be held to be outside the protective scope of 703(h).

Affirmance of the Circuit Court opinion would be contrary to the over-all intent and purpose of the Act. To interpret 703(h) as permitting any test provided it is professionally created would allow invidious classifications based on racial characteristics, a direct violation of 703(a). Thus, to adopt any other standard than job-relatedness would render Section 703(h) inconsistent with 703(a) and thereby impede progress towards the goal of equal employment opportunity. Judge Sobeloff, eloquently dissenting in *Griggs*, carefully posed the issue: it is "whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifuous but hollow rhetoric." *Griggs v. Duke Power Co.*, 292 F. Supp. 243. As it has been appropriately stated by the United States Court of Appeals, Eighth Circuit: "it is essential that exams be objective in nature, that they be designed to test the ability of the applicant to do the work usually required . . . and that they be given and graded in such a manner as to permit review." *United States v. Sheet Metal Workers*, 416 F. 2d 123 (8th Cir. 1969).

## CONCLUSION

The decision of the Circuit Court sustaining the validity of Duke's employment criteria should be reversed.

Dated: New York, New York, August 11, 1970.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 124

WILLIE S. GRIGGS, ET AL., PETITIONERS

v.

DUKE POWER COMPANY

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FOURTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## OPINIONS BELOW

The opinion of the court of appeals (A. 206a-250a) is reported at 420 F. 2d 1225. The opinion of the district court (A. 26a-42a) is reported at 292 F. Supp. 243.

## JURISDICTION

The judgment of the court of appeals was entered on January 9, 1970. The petition for a writ of certiorari was filed on April 9, 1970, and was granted on June 29, 1970 (399 U.S. 926). The jurisdiction of this Court rests on 28 U.S. 1254(1).



### QUESTION PRESENTED

Whether it is unlawful under Title VII of the Civil Rights Act of 1964 for an employer to require completion of high school or passage of certain general intelligence tests as a condition of eligibility for employment in, or transfer to, jobs formerly reserved only for white employees, when:

(1) both requirements operate to disqualify Negroes at a substantially higher rate than whites; and

(2) neither has been shown to be necessary for successful performance of the jobs.

### STATUTE AND REGULATION INVOLVED

Title VII of the Civil Rights Act of 1964 (78 Stat. 253, *et seq.*, 42 U.S.C. 2000e, *et seq.*) provides in pertinent part as follows:

SEC. 703(a) It shall be an unlawful employment practice for an employer—

\* \* \* \* \*

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

\* \* \* \* \*

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer \* \* \* to give and to act upon the results of any professionally developed ability test provided that

such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin. \* \* \*

\* \* \* \* \*

The Equal Employment Opportunity Commission *Guidelines on Employment Testing Procedures*, adopted August 24, 1966, CCH *Employment Practice Guide*, ¶ 16,904, state in pertinent part as follows:

\* \* \* \* \*

The Commission interprets "professionally developed ability test" [in Section 703(h)] to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.

#### INTEREST OF THE UNITED STATES

Federal responsibility for enforcing Title VII of the Civil Rights Act of 1964 rests with the Attorney General and the Equal Employment Opportunity Commission. Pursuant to Title VII and the provisions of Executive Order 11246 prohibiting employment discrimination by government contractors and subcontractors, the United States is engaged in comprehensive efforts to eliminate racially discriminatory employment practices and to remedy the continuing effects of past discrimination. But the goal of equal

employment opportunity remains unrealized; unemployment and underemployment among Negroes and other minority groups continues to be substantially higher than it is among the population at large,<sup>1</sup> and remains a serious national problem.

The Equal Employment Opportunity Commission issued *Guidelines on Employment Testing Procedures*<sup>2</sup> shortly after Title VII became effective. The Guidelines interpreted Section 703(h) as permitting only tests which measure ability to perform the jobs for which they are used, that is, "job-related" tests. The Commission's interpretation was based on the legislative history of Title VII in general and the testing proviso of Section 703(h) in particular, and has been followed elsewhere in the Executive Branch.<sup>3</sup>

The decision of the court of appeals is inconsistent with the Commission's interpretation of Section 703 (h) and would, if permitted to stand, sanction the use of employment screening devices which do not measure abilities to perform specific jobs but do seriously limit employment and promotion opportunities for Negroes and other minority groups. This would seri-

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<sup>1</sup> For example, in July 1970, the unemployment level for nonwhites was 8.3 percent, while that for whites was 4.7 percent. See Bureau of Labor Statistics, *Employment and Earnings*, August 1970, Table A-3, *Major Unemployment Indicators*.

<sup>2</sup> The guidelines were issued on August 24, 1966, and published in CCH *Employment Practice Guide* ¶ 16,904, and are reprinted in the Appendix pp. A-129b-136b. Revised guidelines, effective August 1, 1970, 29 C.F.R. 1607, are reprinted in the Appendix to petitioners' brief, pp. 8-11.

<sup>3</sup> The Secretary of Labor has applied the same testing standard with respect to the employment practices of federal contractors and subcontractors under Executive Order 11246 (see 33 Fed. Reg. 14392).

ously impede the government's continuing efforts to achieve the equality of employment opportunities which Title VII was intended to insure.

#### STATEMENT

1. Traditionally, respondent Duke Power Company discriminated on the basis of race in the hiring and assigning of employees at its Dan River Steam Station in Eden, North Carolina (A. 32a).<sup>4</sup> Negroes were employed only in the Labor Department, where the highest paying jobs they occupied paid less than the lowest paying jobs in four other "operating" departments, in which only whites were employed (A. 32a, 72b). The "operating" departments were the Coal Handling Department, responsible for receiving, weighing, sampling, and storing coal; the Operating Department, responsible for operating the boilers, turbines, and auxiliary equipment used to generate electric power; the Maintenance Department, responsible for mechanical, electrical, and related maintenance activities; and the Laboratory and Test Departments, which are responsible for various chemical and electrical monitoring activities necessary to the operation of the power station (A. 55a-58a). Certain miscellaneous jobs, such as watchman, were also white only (A. 58a). Promotions were normally made within each department on the basis of job seniority.

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<sup>4</sup>The printed Appendix in this case is supplemented by a separate Exhibit volume. Page references to the Appendix are identified by a lower case "a", *e.g.*, A. 32a, and those to the Exhibit volume by a lower case "b", *e.g.*, A. 72b.

Transferees into a department usually began in the lowest position (A. 58a-60a, 208a).

A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department (A. 69a, 83b).

In the 1950's the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal Handling Department or Watchman to any "inside" department (Operations, Maintenance, or Laboratory and Test Departments) (A. 85a, 92a). When the Company abandoned its policy of restricting Negroes to the Labor Department, completion of high school was also made a prerequisite to transfers from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees without a high school education continued to perform satisfactorily and achieve promotions in the the "operating" departments (A. 77b, 83b, 126b-127b).

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two commercially prepared aptitude tests, as well as have a high school education (A. 86a-87a). Completion of high

school alone continued to render incumbent employees eligible for transfer to the four desirable departments from which Negroes had been excluded. In September 1965, the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor, Coal Handling or Watchman to an "inside" job by passing the two tests (A. 85a-86a).

The tests used were the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Aptitude Test (A. 165a). Neither was intended to measure the ability to learn or perform a particular job or group of jobs (A. 109a; 181a-184a). The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates (A. 87a-88a; 181a-183a). The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.<sup>5</sup>

2. This class suit was brought by the thirteen Negro employees of the Labor Department on October 20, 1966, alleging that the Company's testing, transfer, and seniority practices violated the rights of incumbent Negro employees under Title VII of the Civil Rights Act of 1964 by conditioning eligibility for transfer out of the Labor Department on educational or testing requirements which were not imposed on

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<sup>5</sup>The cut-off on the Wonderlic test was slightly lower than the national median for high school graduates, while that used on the Bennett test coincided with the national median score. Company witnesses testified that their objective in selecting the cut-offs was to set them at levels achieved by the "average" high school graduate (A. 181a-183a).

white employees previously assigned to jobs in more desirable departments. They further contended that, even if applied by the Company only to persons hired after they were instituted, the high school and testing requirements were unlawful since, by disqualifying Negroes in substantially higher proportions than whites, they operated to restrict Negroes to the low paying labor jobs when there was no business necessity for doing so, thus perpetuating the effects of the Company's past discrimination.

Through expert testimony, the plaintiffs attacked the testing requirements on grounds that the Company had not shown that the tests measured capacity to perform, or predicted success in, any particular job or class of jobs in the plant. The testimony of plaintiffs' expert also tended to show that the tests disqualified a larger proportion of Negroes than whites (A. 140a, 147a-148a, 154a-155a).

The Company's expert conceded that the tests were not designed to measure a person's capacity to perform certain jobs. He testified that they were intended merely as a substitute for a high school education on "the assumption \* \* \* that \* \* \* the high school education [provides] the training and ability and judgment that a person need[~~ed~~<sup>s</sup>] \* \* \* to do the jobs" in the plant (A. 181a). The Company did not, however, demonstrate any relationship between completion of high school and successful job performance (A. 93a, 188a). The high school requirement was instituted solely because Company officials thought such a policy desirable (A. 93a, 103a-104a).

3. The district court found that the Company had followed a policy of overt racial discrimination prior to the adoption of the Act, but that, as of the time of trial, the practice of making initial assignments based on race had ceased (A. 32a). While the court agreed that the Company's limitations on transfer eligibility and its department seniority system resulted in continuation of past inequities, it denied relief on the ground that application of Title VII was intended to be prospective only (A. 34a-35a).

The court of appeals reversed in part, unanimously rejecting the district court's holding that Title VII does not prohibit facially neutral practices which perpetuate the effects of past discrimination. The court of appeals ruled that Negroes employed in the Labor Department at a time when there was no high school requirement for entrance into the higher paying departments could not now be made subject to that requirement, since whites hired contemporaneously into those departments were never subject to it. The court also required that the seniority rights of those Negroes be measured on a plant-wide, rather than a departmental, basis.<sup>6</sup>

With respect to Negroes hired *after* imposition of the high school requirement, however, a majority of the court of appeals affirmed the judgment of the

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<sup>6</sup> The court held that the case was moot as to four Negro employees. Three have a high school education and have been transferred out of the Labor Department, while the fourth recently completed a high school equivalency course. The logic of the court's seniority ruling, *i.e.*, that the plaintiffs to whom the high school requirement may no longer be applied must be accorded plant-wide seniority, applies as well to these



district court. The court noted that there was no finding of a racial purpose or motive in the adoption of the high school or test requirements and that they had been applied fairly to whites and Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. The court expressly rejected petitioners' contention that, since both requirements operated to disqualify proportionately more Negroes than whites, they were unlawful under Title VII unless shown to be valid predictors of job success ("job-related"). Judge Sobeloff dissented from this aspect of the decision, maintaining, as do petitioners in this Court, that Title VII prohibits the use of employment criteria which operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used.

#### SUMMARY OF ARGUMENT

Duke Power Company formerly made it a practice to assign Negro employees only to its lowest paying, laboring jobs. That practice has apparently been abandoned, and the Company does not engage in overt discrimination. Now, however, Duke requires that applicants for assignment or transfer to previously "white" jobs have either completed high school or scored satisfactorily on two commercially available paper-and-pencil aptitude tests. Use of these two

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four who have a high school diploma or its equivalent, since they too were originally assigned to the Labor Department on account of race, and continued to work in that Department until well after the effective date of Title VII.

standards violates Section 703(a)(2) of the Civil Rights Act of 1964 because neither has been shown fairly to predict successful performance of the jobs for which they are used, and both operate to disqualify substantially higher percentages of Negro applicants than white.

1. Lower federal courts have consistently endorsed the proposition that the ongoing effects of past racial discrimination may be remedied under Title VII. Courts of appeals for the Fifth, Sixth, Eighth, and, in this case Fourth, Circuits, as well as a number of district courts, have required abandonment or modification of facially neutral practices because they perpetuated the effects of earlier overt discrimination. The seniority systems<sup>7</sup> and the union membership and job referral restrictions<sup>8</sup> which have been held illegal by other federal courts, like the high school completion and test requirements at issue here, retarded advancement of blacks into jobs from which they formerly were excluded and were not required by business necessity.

2. Respondent contends, and the majority of the court of appeals agreed, that the tests are protected by the "professionally developed ability test" provision in Section 703(h). This expansive reading of the provision to permit use of racially exclusionary

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<sup>7</sup> *Local 189, United Papermakers and Paperworkers v. United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919; *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.).

<sup>8</sup> *United States v. IBEW Local 38*, 63 Lab. Cas. ¶ 9463 (C.A. 6); *United States v. Sheet Metal Workers Int. Ass'n, Local U. 38*, 416 F. 2d 123 (C.A. 8); *Local 53 of Int. Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler*, 407 F. 2d 1047 (C.A. 5).

tests unrelated to ability to perform the job applied for conflicts with its language and is unsupported by its legislative history. The position of the Equal Employment Opportunity Commission that the provision permits only job-related ability testing should have been upheld by the court of appeals.

## ARGUMENT

### I

THE COMPANY'S HIGH SCHOOL/TEST REQUIREMENT FOR EMPLOYMENT IN TRADITIONALLY ALL-WHITE DEPARTMENTS VIOLATES SECTION 703(a)(2) OF THE CIVIL RIGHTS ACT OF 1964

A. AN EMPLOYMENT PRACTICE THAT APPEARS NEUTRAL BUT HAS THE EFFECT OF DISCRIMINATING ON THE BASIS OF RACE WITHOUT BUSINESS NECESSITY IS PROHIBITED

Petitioners' basic contention, with which we agree, is that the rights created by Congress when it enacted Title VII of the Civil Rights Act of 1964 may no more be frustrated by apparently neutral employment practices, not justified by business necessity, which have racially exclusionary effects than by overtly discriminatory practices.

Federal courts have long looked beyond the apparent neutrality of practices to discern and remedy interference with federally protected rights to equality of treatment. As early as 1915, in *Guinn v. United States*, 238 U.S. 347, this Court invalidated a provision of a state constitution which, although neutral on its face, operated to limit the rights of Negroes to vote, in violation of the Fifteenth Amendment. This Court has since consistently invalidated "so-

phisticated as well as simple-minded modes of discrimination" in education and voting rights, each time finding behind the apparent racial neutrality of the challenged statute or procedure, the promotion or perpetuation of racial discrimination.

That employment rights under Title VII are legislatively created, in contrast to the constitutionally protected rights involved in the voting and school cases,<sup>9</sup> does not justify less judicial protection of them, as courts of appeals interpreting Title VII have uniformly recognized. For example, in *Local 189, United Papermakers and Paperworkers v. United States*, 416 F. 2d 980 (C.A. 5), certiorari denied, 397 U.S. 919, the court held that Title VII prohibited a seniority system under which promotions were made on the basis of "in-job" rather than "in-plant" seniority. The effect of this system was to discriminate in favor of whites hired at the same time or later for jobs from which Negroes, who presumably would have qualified for them, were excluded when they were hired. The same court similarly ruled that restriction of union membership to relatives of current members, who were all white, was prohibited by Title VII. *Local 53 of Int. Ass'n of Heat & Frost I. & A.*

<sup>9</sup> *Lane v. Wilson*, 307 U.S. 268, 275; see, e.g., *Louisiana v. United States*, 380 U.S. 145; *Goss v. Board of Education*, 373 U.S. 683; *Monroe v. Board of Commissioners*, 391 U.S. 450. See, also, *Smith v. Texas*, 311 U.S. 128, 132.

<sup>10</sup> But cf. *Gaston County v. United States*, 395 U.S. 285. The right being enforced there—the right to vote without satisfying a literacy requirement—is a legislatively created right which, although constitutionally permitted, was not in itself constitutionally mandated.

*Wkrs. v. Vogler*, 407 F. 2. 1047 (C.A. 5). Cf. *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552. And two counts of appeals have declared invalid union referral systems which accorded priority to union members and applicants with prior work experience where the union had permitted only whites to obtain such membership or experience.<sup>11</sup> District courts have generally reached similar results.<sup>12</sup> Indeed, in an analogous decision, a Massachusetts district court held that the Fourteenth Amendment prohibits a public employer from deciding among applicants on the basis of scores on tests which are not job-related.<sup>13</sup>

In each case, the courts have found that the discriminatory employment practice was not shown to be necessary to the "safe and efficient operation" of the business. *Local 189, supra*, 416 F. 2d at 989. Sincere but unsupported assertions by management of the general desirability of a given practice do not meet this test of strict necessity. Where criteria operate to exclude proportionately more Negroes than

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<sup>11</sup> *United States v. Sheet Metal Workers Int. Ass'n, Local U. 36, supra*, and *United States v. IBEW Local 38, supra*. See also *Marcus Jones v. Lee Way Motor Freight, Inc.*, No. 464-69 (C.A. 10), decided August 17, 1970.

<sup>12</sup> *Quarles v. Philip Morris, Inc., supra*; *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio); *Clark v. American Marine Corporation*, 304 F. Supp. 603 (E.D. La.); *Robinson, et al. v. P. Lorillard Co.*, 62 Lab. Cas. ¶9423 (M.D. N.C.); but see *United States v. H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala.), appeal pending (C.A. 5, No. 27,703); *Colbert v. H. K. Corp.* (N.D. Ga., Civ. No. 11599, decided July 6, 1970).

<sup>13</sup> *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass.).

whites, the courts under Title VII have insisted that the criteria be predictive of success in performance. An example of a valid criterion suggested by the court of appeals for the Fifth Circuit was that typists pass a typing test. *Local 189, supra*, 416 F. 2d at 989. And the court of appeals for the Eighth Circuit held that union journeymen tests must "be designed to test the ability of the applicant to do that work usually required of a journeyman." *United States v. Sheet Metal Workers, Int. Ass'n, Local U. 36*, 416 F. 2d at 136. Accord, *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 452, 461 (S.D. Ohio).

The court of appeals below held, consistently with these decisions, that the high school/test requirement for transfer from the Labor Department could not be applied to Negroes who were hired prior to the time when completion of high school became a prerequisite to initial placement in other jobs because whites hired contemporaneously into those jobs had not been subjected to such a requirement. The majority refused, however, to eliminate the high school and test requirements as applied to Negroes hired after they were made applicable to all employees. It held that Duke had adopted the high school requirement with a "genuine business purpose" in mind and without any "intention to discriminate against Negro employees."

This focus on the employer's motive, rather than its need, is, we submit, what apparently misled the court. For the congressional purpose in enacting Title VII was—as its heading "Equal Employment Opportunities" suggests—to accomplish economic results, not

merely to influence motives or feelings. Discriminatory "employment practices"—not attitudes—are declared unlawful. As Judge Sobeloff's dissenting opinion in this case points out (A. 245a-246a), the congressional objective is not achieved by an interpretation of the Act which would merely assure those discriminatorily excluded from jobs for which they are, in fairness, qualified that the employer is discriminating in good faith.<sup>14</sup> The proper interpretation, in our view, is that articulated (in a constitutional decision) thirty years ago by Mr. Justice Black for a unanimous Court: "What the [Act] \* \* \* prohibits is racial discrimination \* \* \* whether accomplished ingeniously or ingenuously \* \* \*." *Smith v. Texas*, 311 U.S. 128, 132.

B. THE HIGH SCHOOL COMPLETION AND WRITTEN TEST REQUIREMENTS IMPOSED HERE DISQUALIFY A SUBSTANTIALLY GREATER PROPORTION OF NEGROES THAN WHITES FROM EMPLOYMENT OPPORTUNITIES

Both a high school completion requirement and testing requirements such as those used here generally operate to disqualify a greater percentage of Negroes than whites from employment opportunities—a result which is not surprising in view of the segregated and inferior educational opportunities which have been afforded Negroes. See *Gaston County v. United States*, 395 U.S. 285, 295.

1. *The High School Requirement.* Reports of the Bureau of the Census confirm that proportionately

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<sup>14</sup> Nor is the fact that the discrimination is not based *solely* on race material, in light of the Act's explicit legislative history. See Brief for the United States as *Amicus Curiae* in *Phillips v. Martin Marietta Corp.*, No. 73, this Term, p. 9.

fewer Negroes than whites in the United States have completed high school. In 1960, 43.2 percent of whites, but only 21.7 percent of nonwhites, in the United States who were 25 or older had completed high school.<sup>15</sup> Similar disparity is found in more specific comparisons, by sex, or narrower age group.<sup>16</sup> Thus, of nonwhite men 25 to 29 in 1960, only 36.2 percent had completed high school; the comparable figure for whites was 62.7 percent.<sup>17</sup> The disparity is more marked in North Carolina than in the Nation as a whole. The 1960 census figures for that State show that 37 percent of whites 25 or older had completed high school, while only 14.7 percent of nonwhites in that age group had done so.<sup>18</sup> Although the level of educational achievement has risen for both Negroes and whites in the past ten years, the disparity in proportion of high school graduates remains substantial.<sup>19</sup>

2. *The Tests.* Both the majority and dissenting opinions below were written on the premise that the respondent's testing requirements operate to disqual-

<sup>15</sup> U.S. Bureau of the Census, *Census of the Population: 1960*; Volume 1, Characteristics of the Population; Part 1, Table 174, pp. 1-419, 1-420.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> U.S. Bureau of the Census, *Census of the Population: 1960*; Volume 1, Characteristics of the Population; Part 35, Table 47, p. 35-167.

<sup>19</sup> A recent report prepared jointly by the Bureau of Labor Statistics and the Bureau of the Census indicates that, of all Negroes 20 and 21 years old in the country in 1969, 57.8 percent had completed high school. Among all whites in the same age group, however, 81.7 percent had completed high school. Bureau of Labor Statistics *Report No. 375: The Social and Economic Status of Negroes in the United States, 1969*, p. 50.



ify Negroes in substantially higher proportions than whites "because of Negroes' cultural and educational disadvantages \* \* \*" (A. 216a; see A. 231a-232a). As Judge Sobeloff put the matter, "No one seriously questions the fact that, in general, whites fare far better on the Company's alternative requirements than blacks" (A. 231a, n. 6). The accuracy of that premise is supported both by expert testimony in this case (see A. 140a-141a, 154a-155a) and by published studies of performance on standardized, paper-and-pencil aptitude tests, including those used here.<sup>20</sup>

These tests verbally measure (or sample) previously acquired knowledge and skills, as a basis for predicting ability to enhance them. Individuals or groups who have not had equal opportunity to acquire the kinds of knowledge and develop the verbal skills these tests record may obviously be expected to fare less well on them. To the extent variation in exposure is reflected by test scores, their value as an index of ability to enhance these skills is diminished. ~~Studies of the index of native ability is diminished.~~ Studies of the Wonderlic Personnel Test, employed here, and similar "standardized" tests tend to bear out this hypothesis of bias and show that the mean scores of Negroes are predictably lower than those of whites.<sup>21</sup>

<sup>20</sup> Kirkpatrick, et al., *Testing and Fair Employment: Fairness and Validity of Personnel Tests for Different Ethnic Groups*, New York University Press, New York, 1968, at p. 5; Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1638-1649 (1969).

<sup>21</sup> See Cooper and Sobol, *supra*, at 1640-1641; Ruda and Albright, *Racial Differences on Selection Instruments Related to Subsequent Job Performance*, 21 Personnel Psychology 31 (1968).

C. THERE IS NO BUSINESS NECESSITY FOR THE APPLICATION HERE  
OF THE DIPLOMA/TEST REQUIREMENT

The Company did not, and indeed on this record could not, show that legitimate business needs justified its application of the high school completion or test requirements to the broad categories of jobs involved.

There is no dispute that neither requirement bears a demonstrable relationship to successful performance of the jobs for which they were used. Both were adopted, as the majority below noted, without formal study of their relationship to job-performance ability (A. 93a). Rather, a vice president of the company testified, they were instituted on the company's judgment that they would generally improve the quality of the work force (A. 93a-94a). As previously indicated (*supra*, pp. 12-16), however, the test of business necessity in this context is a strict one; it is not satisfied by the mere profession of a business purpose, such as an employer's self-serving and unsupported assertion that it *thinks* the particular practice in question is desirable.

Indeed, here the same vice president acknowledged that "[t]here is nothing magic about [the high school requirement], and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up \* \* \*" (A. 93a). And the evidence shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and progress in departments for which the high school and

test criteria now are used. Between July 2, 1965, and November 14, 1966, for example, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of employees in the entire white work force who were not high school graduates.<sup>22</sup> The promotion record of persons who do not meet the requirements thus indicates they are not needed even for the limited purpose of insuring that the policy of advancement within the company is not hampered by initial employment of individuals who lack the capacity to perform jobs for which they will be eligible in the future.<sup>23</sup>

There is, in short, no legitimate need in the safe and efficient conduct of its business which justifies the respondent's insistence on employees with credentials not shown to be job-related in jobs that were previously reserved for whites. Since these unnecessary employment requirements have a racially discriminatory effect, they are prohibited by Section 703 (a) (2) of the Act.

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<sup>22</sup> The Company's Answers to Plaintiffs' Interrogatories show that 15 white employees were promoted during that period, of whom 5 (33.3%) were not high school graduates. As of April 29, 1966, there were 82 white employees at Dan River, of whom 30 (36.6%) were not high school graduates (A. 77b, 83b, 109b, 126b-127b).

<sup>23</sup> We do not believe, in any event, that the company has made a sufficient showing of the importance of that policy to the success of its operations to justify application of its discriminatorily exclusionary requirements to the broad spectrum of jobs to which they are applied.

SECTION 703(H) OF THE ACT DOES NOT AUTHORIZE THE USE  
OF APTITUDE TESTS THAT ARE NOT JOB-RELATED

A. THE LANGUAGE OF SECTION 703(H) AND ITS INTERPRETATION  
BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PRE-  
CLUDE TESTS WHICH DO NOT PREDICT SUCCESS IN THE JOBS  
FOR WHICH THEY ARE GIVEN

The respondent contends that its tests, at least, are specifically permitted by Section 703(h) of the Act (*supra*, pp. 2-3), which authorizes use of "professionally developed ability test[s]" that are not "designed, intended, or used" to discriminate. The majority of the court below accepted this contention that Section 703(h) permits tests unrelated to prospective job performance, notwithstanding the Equal Employment Opportunity Commission's contrary interpretation, to which the Commission has consistently adhered, that Section 703(h) authorizes only the use of job-related tests.<sup>24</sup>

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<sup>24</sup> The Commission's *Guidelines on Employment Testing Procedures* were adopted on August 24, 1966, and published in CCH *Employment Practice Guide* ¶16,904. Revised *Guidelines on Employee Selection Procedures*, taking the same position on employment tests, effective August 1, 1970. They are published at 29 C.F.R. part 1607, and are reprinted in the Appendix x to petitioners' brief (pp. 8-11).

Three recent decisions (reported with names omitted) in which the Commission applied its job-relatedness standard to Employment tests appear in CCH *Employment Practice Guide* ¶6112 (January 29, 1970); ¶6136 (March 17, 1970); ¶6139 (February 19, 1970) (challenge to use of Wonderlic Personnel and Bennett Mechanical Aptitude tests at issue here). See, also, CCH *Employment Practice Guide* ¶17,304.53 (Dec. 2, 1966)

The Commission's interpretation is, of course, entitled to great deference from the courts and, since it is reasonable and consistent with the purpose of Title VII, should prevail. See, *e.g.*, *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315; *Udall v. Tallman*, 380 U.S. 1; *Bowe v. Colgate-Palmolive Co.*, 416 F. 2d 711 (C.A. 7). Not only is this interpretation consistent with the statutory language, but it is the only one under which use of the word "ability" in the statutory phrase "professionally developed ability tests" is meaningful. Since any professionally developed test measures some "ability," that word, if it is not to be redundant, should be read as a delimiting term which, in context, naturally refers, as the Commission's guidelines state (*supra*, p. 3), to "ability to perform [the] particular job or class of jobs" for which the test is required.<sup>25</sup>

(reprinted in appendix to petitioners' brief, pp. 1-2); ¶17,304.55 (Dec. 6, 1966) (reprinted in appendix to petitioners' brief, pp. 3-5).

<sup>25</sup> Moreover, Section 703(e)(1) of Title VII, 42 U.S.C. 2000e-2(e)(1), permits employment on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The Section significantly omits reference to race as a criterion for employment, implying a legislative judgment that race can never be a bona fide occupational qualification. Where, as here, the effect of employment criteria is indirectly to make race a basis of employment by screening out a disproportionate number of Negroes, the standard for justification of such criteria should surely be no less than that specified in Section 703(e)(1) for bona fide *occupational* qualifications—which must, of course, be job-related. See, generally, Brief for the United States as *Amicus Curiae* in *Phillips v. Martin Marietta Corp.*, No. 73, this Term.

B. THE LEGISLATIVE HISTORY OF SECTION 703(H) INDICATES THAT CONGRESS CONTEMPLATED USE OF JOB-RELATED TESTS ONLY

The present Section 703(h) was not contained in the House version of the Civil Rights Act<sup>26</sup> but was added on the Senate floor during extended debate. The controversy in the Senate over testing grew out of a February 1964 decision by a hearing examiner for the Illinois Fair Employment Practices Commission in the case of *Leon Myart v. Motorola Co.*<sup>27</sup> The examiner ruled that a standardized aptitude test given by Motorola to job applicants "does not lend itself to equal opportunity to qualify for the hitherto culturally deprived and disadvantaged groups," and ordered the company to discontinue its use.<sup>28</sup>

The *Motorola* case was first brought to the attention of the Senate on March 12, 1964, by Senator Robertson of Virginia,<sup>29</sup> and was a subject of debate during the next several months. A number of opponents of the civil rights bill, including Senators Ervin,<sup>30</sup> Smathers,<sup>31</sup> Holland,<sup>32</sup> Hill,<sup>33</sup> Tower,<sup>34</sup> Talmadge,<sup>35</sup>

<sup>26</sup> The full text of H.R. 7152, the civil rights bill passed by the House on February 10, 1964, annotated to show the changes made by the Senate, appears at 110 Cong. Rec. 12807-12817.

<sup>27</sup> The decision is reprinted at 110 Cong. Rec. 5662 (1964).

<sup>28</sup> For an account of the *Motorola* case, and of the influence it had on congressional debate of Title VII, see Ash, *The Implications of the Civil Rights Act of 1964 for Psychological Assessment in Industry*, 21 *American Psychologist* 797 (1966).

<sup>29</sup> 110 Cong. Rec. 5081-5082.

<sup>30</sup> 110 Cong. Rec. 5614-5616.

<sup>31</sup> 110 Cong. Rec. 5999-6000.

<sup>32</sup> 110 Cong. Rec. 7012-7013.

<sup>33</sup> 110 Cong. Rec. 8447.

<sup>34</sup> 110 Cong. Rec. 9024.

<sup>35</sup> 110 Cong. Rec. 9025-9026.

Fulbright,<sup>36</sup> and Ellender,<sup>37</sup> criticized the decision. The common thread of concern in this Senate criticism was that employers would be precluded from making ability to perform a job a condition of employment.

Thus Senator Smathers charged on April 13 that Title VII would require employers to "accept applicants for jobs *irrespective of whether they have ability or not*" (emphasis added).<sup>38</sup>

In the same vein Senator Hill on April 20 stated that in *Motorola*, "the Illinois FEPC examiner threw merit and ability out the window as employment criterions [*sic*] and forced the company to hire the complainant, notwithstanding the fact that he obviously did not possess the professional standards *necessary to do the job*" (emphasis added).<sup>39</sup>

On April 24, Senators Tower and Talmadge engaged in a colloquy regarding the decision:

MR. TALMADGE. \* \* \* Is it not true that the decision of the examiner in the *Motorola* case put a premium on ignorance for prospective employees, instead of intelligence?

MR. TOWER. It certainly put a premium on ignorance. It said, in effect, that a test is discriminatory if it discriminates against those who are by virtue of intellectual and educational background *incompetent to do a particular job*.

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<sup>36</sup> 110 Cong. Rec. 9599-9600.

<sup>37</sup> *Ibid.*

<sup>38</sup> 110 Cong. Rec. 7791; see also, 110 Cong. Rec. 7800.

<sup>39</sup> 110 Cong. Rec. 8447.

It is certainly right and proper for a private company to *require that a man possess certain skills necessary to perform the work required by that company*, or that he possess a sufficient intellect to be trainable to do a specific job.

Mr. TALMADGE. The bill [Title VII] does not guarantee anyone a job at any time, does it?

Mr. TOWER. It does not guarantee anybody a job, but it would compel an employer to hire persons *whom he does not believe to be competent to perform the work* [emphasis added].<sup>40</sup>

Senator Fulbright, on April 29, remarked:

The Motorola case shows, too, to any reasonable person what a disastrous thing it would be if companies were prohibited from applying aptitude tests or any other kind of tests of that nature *which are intended to test the capacity or ability of an applicant for a particular job*. It is a very clear warning of what we could expect if this section of the bill were adopted [emphasis added].<sup>41</sup>

Proponents of Title VII sought throughout the debate to assure these critics that their fears about the implications of *Motorola* were groundless. They insisted that Title VII would have no effect on job-related tests. Senator Case, co-manager with Senator Clark of the bill on the Senate floor, issued a memorandum for the record on March 26, explaining why the *Motorola* result could not be reached under Title VII:

<sup>40</sup> 110 Cong. Rec. 9025-9026.

<sup>41</sup> 110 Cong. Rec. 9600.



\* \* \* \* \*

[U]nlike the hearing examiner's interpretation of the Illinois law in the Motorola case, title VII most certainly would not authorize any requirement that an employer accept *an unqualified* applicant or *a less qualified* applicant and undertake to give him any additional training which might be necessary to enable him to fill the job.

Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color, that is, because he is a Negro. But it expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet *the applicable job qualifications*. *Indeed, the very purpose of title VII is to promote hiring on the basis of job qualifications*, rather than on the basis of race or color [emphasis added].<sup>42</sup>

Similarly, the Clark-Case Interpretative Memorandum of Title VII, submitted for the record on April 8, stated:

There is no requirement in title VII that employers abandon *bona fide qualification tests* where, because of differences in background and education, members of some groups are able to perform better on those tests than members of other groups. An employer may set *his qualifications* as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance [emphasis added].<sup>43</sup>

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<sup>42</sup> 110 Cong. Rec. 6416; also reprinted at 110 Cong. Rec. 7246-7247.

<sup>43</sup> 110 Cong. Rec. 7213.

Despite these assurances by the bill's supporters, opposing Senators continued to fear that Title VII might be construed to prohibit the use of tests to determine qualifications for particular jobs if blacks failed such job related tests in greater proportions than whites. As a result, Senator Tower, on May 19, offered a proposed amendment to Section 703(h):

(h) Notwithstanding any other provision of this Title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—

(1) in the case of any individual who is seeking employment with such employer, *such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved*, and such test is given to all individuals seeking similar employment with such employer without regard to the individual's race, color, religion, sex, or national origin, or

(2) in the case of any individual who is an employee of such employer, *such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise*, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin."

"110 Cong. Rec. 11251 (emphasis added).

In urging adoption of the amendment, Senator Tower argued:

If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person *to do a job* [emphasis added].<sup>45</sup>

Proponents of the bill who opposed the amendment feared that it would make discrimination more difficult to combat.<sup>46</sup> Senator Case's comment is particularly instructive:

If this amendment were enacted, it could be an absolute bar and would give an absolute right to an employer to state as a fact that he had given a test to all applicants, *whether it was a good test or not*, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute [emphasis added].<sup>47</sup>

The amendment was defeated on a roll call vote,<sup>48</sup> but two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of Section 703(h). He stated:

This is similar to an amendment which I offered a day or two ago, and which was, I believe,

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<sup>45</sup> 110 Cong. Rec. 13492.

<sup>46</sup> See 110 Cong. Rec. 13503-13504.

<sup>47</sup> 110 Cong. Rec. 13504.

<sup>48</sup> 110 Cong. Rec. 13505.

agreed upon in principle. But the language was not drawn as carefully as it should have been.<sup>49</sup>

Senator Humphrey responded by announcing that "Senators on both sides of the aisle who were deeply interested in Title VII"<sup>50</sup> believed the amendment was "in accord with the intent and purpose of that title."<sup>51</sup> It was adopted by voice vote immediately thereafter.<sup>52</sup>

The debates surrounding testing and the *Motorola* case thus show that the concern among Senators was that Title VII might operate to limit employers' rights to measure job qualifications by using tests. All the early criticism focused on this fear, and Senator Tower's first proposed amendment was clearly designed to allay it. Senate supporters of the bill opposed the amendment, partly because they feared it would be misconstrued to permit broad use of tests unrelated to job performance, and it was defeated. Senator Tower then offered a substitute, after persuading the bill's sponsors that he had re-drafted the amendment so as to remove this possibility, and it was adopted without substantial opposition. There is no basis for inferring from this history that the job-relatedness standard (which had been explicitly included in the rejected amendment) was not to apply to the tests authorized by the substitute amendment. It shows, instead, that, as enacted, Section 703(h) was believed to be in harmony with "the very purpose of Title VII [which] is to promote

<sup>49</sup> 110 Cong. Rec. 13724.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

hiring on the basis of job qualifications \* \* \*'' (110 Cong. Rec. 6416, *supra*, p. 26) and thus to authorize only job-related tests. The court of appeals' contrary holding—that neither tests nor qualifications need be job-related even if their effect is discriminatory—sanctions unwarranted obstacles to achievement of the congressional objective of equal employment opportunities, and should be rejected by this Court.

#### CONCLUSION

For the foregoing reasons we respectfully urge that the judgment of the court below on the question here presented should be reversed.

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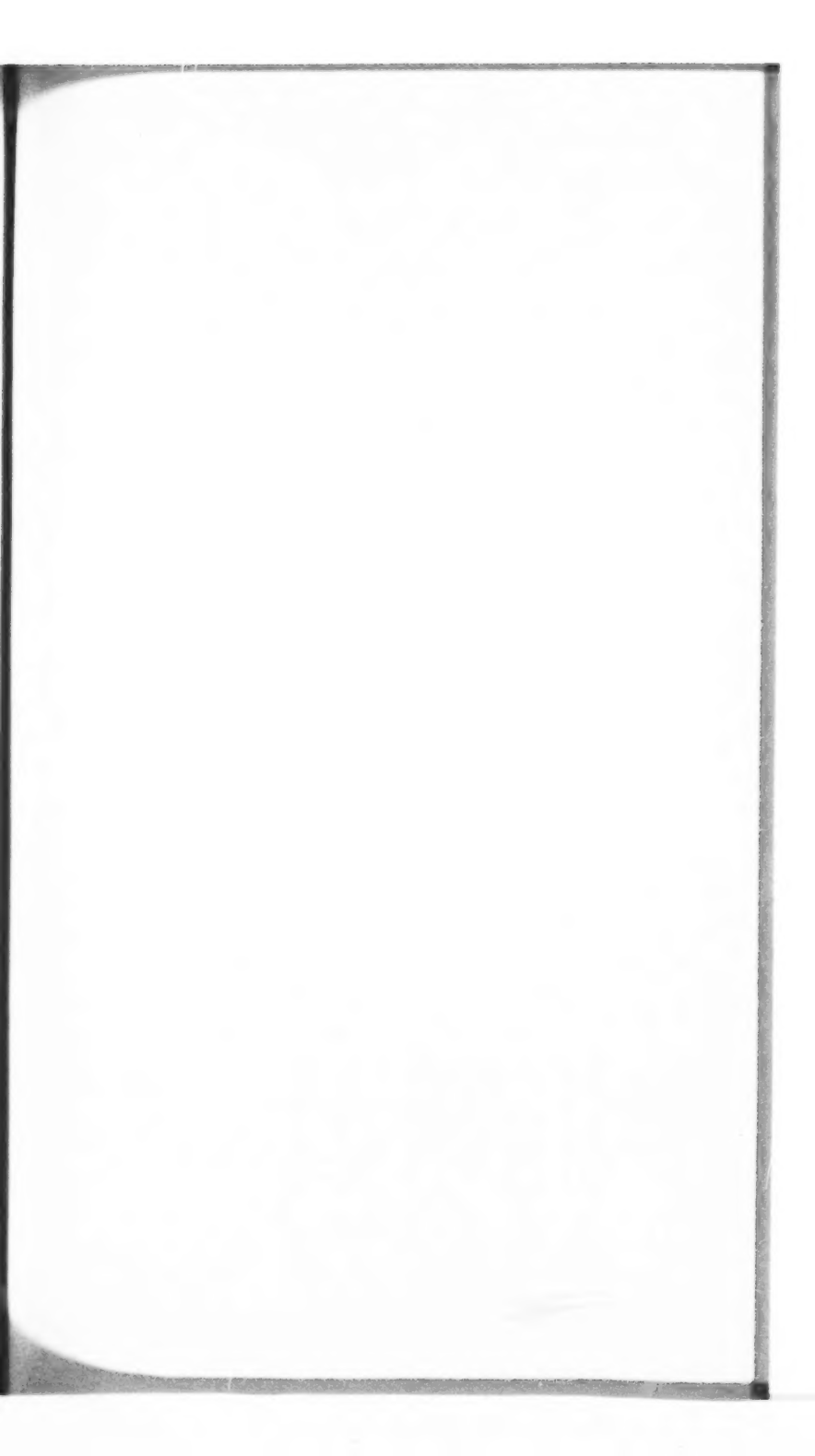
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SEPTEMBER 1970.



**Supreme Court of the United States**

**OCTOBER TERM, 1970**

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**No. 124**

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**WILLIE S. GRIGGS, et al.,**

*Petitioners,*

**v.**

**DUKE POWER COMPANY, a Corporation,**

*Respondent.*

---

**On Writ of Certiorari to the United States Court of  
Appeals for the Fourth Circuit**

---

**BRIEF FOR RESPONDENT**

---

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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No. 124

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WILLIE S. GRIGGS, et al.,  
v. *Petitioners,*

DUKE POWER COMPANY, a Corporation,  
*Respondent.*

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On Writ of Certiorari to the United States Court of  
Appeals for the Fourth Circuit

---

**BRIEF FOR RESPONDENT**

---

**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 420 F. 2d 1255 (1970). The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). Both are reported in the Appendix. (A.)

**JURISDICTION**

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 9, 1970. The Petition for Writ of Certiorari was filed in this Court on April 9, 1970, and certiorari was granted on June 29, 1970. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

### STATEMENT OF THE CASE

The certified evidence of record shows that the employees in the Operating Department at the Dan River Station are responsible for the safe, efficient, and reliable operation of the generating equipment at the station. They operate the boilers, the turbines, the auxiliary and control equipment, the electrical substation and the interconnections between the station, the Duke Power system, and the systems of other power companies. The Maintenance Department is responsible for maintenance of all the mechanical and electrical equipment and machinery in the plant. The employees in the Coal Handling Department weigh, sample, unload, crush, and transport coal received from the mines. In so doing they operate diesel and electric equipment, bulldozers, crushers, heavy machinery, conveyor belts, travelling trippers and other equipment. They must be able to read and understand manuals relating to such complex machinery and equipment in order to progress in this department.

In addition there are service departments such as a Laboratory Department where technicians analyze boiler water to keep it pure enough for use and a Test Department where technicians are responsible for the performance of the power station by maintaining the accuracy of instruments, gauges, and control devices.

In the test, laboratory and clerical groups, the skills required generally relate to intelligence and not manual or mechanical skills. In operations, maintenance and coal handling a general intelligence level and mechanical comprehension are required to progress within those departments.

At least 10 years prior to institution of this action, the Company realized that its business was becoming

more complex and that it had employees who were unable to grasp situations, to read, to reason, and in general did not have an intelligence level high enough to enable them to progress in the Operations, Maintenance and Coal Handling Departments. (A. pp. 93a, 94a, 20b-21b) In an effort to upgrade the quality of its work force, the Company placed into effect the requirement that an employee had to have a high school education or its equivalent (such as a Certificate of Completion of General Education Development (GED) tests, High School Level) to be considered for transfer from the Labor Department or watchman classification into operations, maintenance and coal handling. The same requirement was applicable to those in coal handling who desired to transfer into operations and maintenance. The Company realized that the high school requirement was not perfect, but believed it would give the Company a chance to obtain employees who were more capable of operating generating equipment in an industry which was rapidly developing new technology for electric power generation. The Company uses employees at existing plants to form nuclei of employees at new plants. At the time this case was tried, the Company had a number of computers on order for its generating plants; and it was making plans for placing into operation its first nuclear generating plant. (A. pp. 84a-87a, 92a, 93a, 20b, 21b)

The Company subsequently amended its promotion-transfer requirements by providing that an employee who was on the Company payroll prior to September 1, 1965, and who did not have a high school education or its GED equivalent could become eligible for consideration for promotion or transfer to a department containing higher classified jobs by passing a general intelligence test (Wonderlic) and a general mechanical test (Bennett Mechan-

ical AA) with scores equal to the norms of the average high school graduate. (A. pp. 86a-88a, 137b) This change was made in response to requests from employees in coal handling and was designed to include, rather than exclude, for consideration for promotion those employees, including the Petitioners, who were employed prior to September 1, 1965. (A. pp. 199a, 200a, 21b). Those employees without a high school education who did not desire to qualify for consideration for transfer or promotion to a higher classified department by taking the tests could take advantage of the Company's Tuition Refund Plan in order to obtain a high school education. (A. pp. 90a, 91a, 21b)

To be initially employed in the higher skilled classifications today, *it is necessary to have a high school education and pass the tests involved here* with the score of the average high school graduate.

The District Court found that the Company had a legitimate business purpose in adopting the high school education requirement; that the tests used by the Company were "professionally developed ability tests" within the meaning of Title VII of the Act; that the Company adopted the educational/test requirement without any intention or design to discriminate against the Petitioners because of race or color; that Title VII was prospective, not retroactive; and the requirement had been equally applicable to all employees similarly situated at least since the effective date of the Act, July 2, 1965; and that Petitioners had failed to carry the burden of proof that the Company intentionally discriminated against them on the basis of race or color. Accordingly, the District Court dismissed the complaint.

The Court of Appeals held that the six Negro Petitioners hired before adoption of the educational/test requirement



were entitled to injunctive relief and remanded to the District Court for fashioning of an appropriate remedial decree waiving the requirement as to them and application of plant-wide rather than departmental seniority for promotion of those employees as vacancies in the higher skilled classifications occurred. The situation adverted to on page 7 of Petitioners' Brief involving Clarence M. Jackson, a black employee without a high school education hired prior to adoption of the requirement, is thereby rectified. As to this aspect of the decision below, review was not sought. The Court held that discrimination had been removed with respect to black employees with a high school education and as to them the case was moot. As to the four black employees without a high school education, the Court held they were not entitled to injunctive relief; that the high school education requirement had a legitimate business purpose; that the Company adopted the requirement with no intention of discriminating against Negro employees hired after adoption of the requirement; and that the tests used as a substitute for the high school requirement were professionally developed ability tests within the meaning of Section 703(h) and not designed, intended, or used to discriminate against Petitioners on the basis of race or color. As to this aspect of the majority decision, Petitioners sought and were granted certiorari.

### **QUESTIONS PRESENTED**

Whether the use of a high school educational requirement is an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964; and whether it is an unlawful practice under the Act (in lieu of said educational requirement) to require incumbent employees without a high school education to take and pass a general intelligence test and a mechanical ability test with the

score of the average high school graduate prior to entering the higher skilled lines of progression where the evidence of record conclusively shows and the trial court found:

1. That the tests were "professionally developed ability tests" within the meaning of Section 703(h) of the Act; and

2. That the Company had legitimate business reasons for establishing said requirements because it was necessary to have the general intelligence level and overall mechanical comprehension of a high school graduate to enter and progress in the higher skilled lines of progression and said tests measure such qualifications.

### SUMMARY OF ARGUMENT

#### I

THE HIGH SCHOOL EDUCATION REQUIREMENT WAS ADOPTED IN GOOD FAITH TO SERVE A LEGITIMATE BUSINESS PURPOSE AND MINIMUM TEST SCORES BASED ON HIGH SCHOOL NORMS CONSTITUTE A REASONABLY SATISFACTORY SUBSTITUTE FOR DETERMINING IF EMPLOYEES HAVE THE GENERAL INTELLIGENCE AND OVERALL MECHANICAL COMPREHENSION LEVEL OF THE AVERAGE HIGH SCHOOL GRADUATE.

#### *A. Legitimate Business Purpose.*

The Company found that employees without a high school education were experiencing difficulty in progressing through the higher skilled lines of progression because they were unable to grasp situations, to read and to reason.

Stated differently, it became apparent that a general level of intelligence was necessary to satisfactorily progress in those classifications. Faced with the ever increasing complexity of operations, the Company concluded that it would upgrade the quality of its work force by adopting a policy that all those employed in the higher skilled classifications would, thereafter, be required to have a high school education. This would reasonably assure the Company that future employees would have a good chance to progress in those classifications. The Company's expert witness, Doctor Moffie, whom the Court found to be an expert in the field of industrial and Personnel Testing, agreed with the Company's conclusion in this respect. Petitioners failed to adduce any evidence to the contrary and the trial court and the majority below found that the Company had legitimate business reasons for adopting the high school education requirement.

*B. Tests Are Reasonably Satisfactory Substitute For Determining Whether Employees Have General Intelligence And Overall Mechanical Comprehension Level of Average High School Graduate.*

The passing score on the Wonderlic Test (20), which measures general intelligence, is nearly 2 points lower than the score of the average high school graduate. The passing score on the Bennett Mechanical Test is 39, which is the exact 50th percentile score of high school graduates who have taken the test. Both tests are widely used. Based on this, the Company's expert witness, Doctor Moffie, was of the opinion that the tests were a reasonably satisfactory substitute for determining whether an employee had the general intelligence and overall mechanical comprehension level of the average high school graduate. The Court below so concluded.

THE TESTS USED BY THE COMPANY ARE PROFESSIONALLY DEVELOPED ABILITY TESTS WITHIN THE MEANING OF SECTION 703(h) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND ARE NOT ADMINISTERED, SCORED, DESIGNED, INTENDED, OR USED TO DISCRIMINATE BECAUSE OF RACE OR COLOR.

*A. The Evidence.*

The Company's expert witness testified that in his opinion the tests were professionally developed while Petitioners' expert testified on direct examination that he did not know how the term "Professionally Developed Tests" was used in the statute. Nothing but the arguments of counsel which constitute incompetent evidence would support Petitioners' contention that the tests were discriminatory simply because the Company did not study, evaluate and validate the tests for job performance needs. The subject of psychological testing is a difficult one. For one thing it is relatively new. For another, it is something about which a great deal of disagreement exists. The bald fact that the Company did not study, evaluate and validate the tests in and of itself does not show discriminatory treatment of Blacks.

The tests provided the Blacks involved here with a short-cut to promotional consideration and were designed to include not exclude them. Section 703(h) requires that the Petitioners make an evidentiary showing that the Company intended or used the tests to discriminate. There is no such evidence in this record. Instead, the competent, material and substantial evidence in view of the entire

record as a whole impels the conclusion that the tests were "designed" to determine a person's general level of intelligence and overall mechanical comprehension; and that the tests were "used" as a substitute for a high school education to determine if an individual had the overall general intelligence and mechanical comprehension level of the average high school graduate with no "intent" to discriminate on the basis of race, creed, color or national origin. The trial court found and the majority below agreed that the tests were "professionally developed ability tests" within the meaning of Section 703(h) of the statute and not "designed, intended, or used" to discriminate against the Petitioners.

#### *B. Legislative History.*

The language of Section 703(h) was forged in the crucible of Senate debate. Senator Tower's test amendment [Section 703(h)] was enacted in response to a decision of a hearing examiner for the Illinois Fair Employment Practices Commission which ordered that an employer discontinue the use of a general intelligence test because Negroes were "culturally deprived" and, therefore, placed at a "competitive disadvantage." Supporters of the Tower amendment insisted that Title VII contain explicit provisions which would insure that general intelligence tests could be used. Nowhere in the Act is there a requirement that an employer use only those tests which measure ability or skill required by a specific job or group of jobs. The legislative history unerringly points to the congressional intention that an employer would be permitted to use general intelligence and ability tests. The trial court so found and, notwithstanding the interpretation of the Equal Employment Opportunity Com-

mission (EEOC), the majority below agreed with the District Court that tests do not have to be job-related in order to be valid under Section 703(h). This decision is fortified by the fact that an amendment to Title VII requiring a "direct relation" between tests and a "particular position" was proposed in May of 1968 and defeated.

### III

THE COURT BELOW PROPERLY CONCLUDED THAT RESPONDENT'S EDUCATIONAL AND TESTING REQUIREMENTS WERE LAWFUL, NON-DISCRIMINATORY EMPLOYMENT CRITERIA UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AND THE COMPANY HAD LEGITIMATE BUSINESS REASONS FOR ESTABLISHING SAID CRITERIA.

#### A. *High School Education Requirement.*

The legislative history of the Act clearly shows that an employer's *right* to determine job qualifications was not affected by Title VII. Even though the 1960 Census showed that more Whites than Blacks in North Carolina had a high school education, it must be presumed that Congress *knew* this when it enacted legislation to become effective five years later. If Congress had intended to preclude use of educational requirements, it would have done so in plain language. The General Counsel of the EEOC has issued an opinion stating that discrimination based on educational qualifications does not violate Title VII. One Federal District Court has held that a high school education requirement is not inherently discriminatory under the Act if adopted in good faith and "... for what reasonably appear *to him* to be valid reasons. . . ."

### B. Tests.

Petitioners cite and rely on five District Court cases in support of their contention that tests be job-related in order to be valid. In those cases, Section 703(h) was not before the Court for interpretation.

In one District Court case, however, Section 703(h) was before the Court for interpretation and the trial judge stated that the legislative history of the Act demonstrated a congressional intent that general intelligence and ability tests were permitted under Title VII. The Court said that, even if job-related tests were required by Section 703(h), there was great difficulty in precisely defining job-relatedness and held that *if job-relatedness was required by law* the tests in use met the requirement. The District Court also noted that in office, sales, *technical* or professional jobs a demonstration of general intelligence would be most desirable.

The Circuit Court cases cited by Petitioners in this connection hold only that where a *seniority system*, which originated before the effective date of the Act, has the effect of perpetuating discrimination, relief may be granted under the Act to remedy present and continuing effect of past discrimination. The Court below expressly approved the decisions of the Fifth and Eighth Circuits.

The Petitioners also cite and rely on cases decided by this Court in support of their contentions. All the cases cited involve voting, schooling or jury service, and this Court in those cases determined that it could be presumed or assumed that a significant number of the group involved had the necessary qualifications. It cannot be assumed without evidence that a significant number of Negroes in

the group involved at Dan River have the qualifications to perform jobs in the higher skilled classifications. None of the cases cited by Petitioners in this context are even remotely connected with employment practices under Title VII.

Petitioners also rely on utterances of the Office of Federal Contracts Compliance (OFCC). This is a Title VII case and must be decided within the framework thereof. Interpretations of the EEOC and the OFCC are not binding on the courts, especially where they are clearly contrary to compelling legislative history.

Petitioners and the Solicitor General are unable to cite a single case or convincing legislative history which supports their contention that Section 703(h) *requires* that tests used by private employers be specifically job-related. In addition, they are unable to point to any legally established facts from which the Court could draw an inference that the tests are designed, used, or intended to discriminate against the four Black employees involved in this case.

### *C. Findings of Courts Below.*

Rule 52(a) of *Federal Rules of Civil Procedure* provide that the trial court's findings should not be set aside unless "clearly erroneous." This Court has held that where the findings of the trial court and the court of appeals are concurrent and supported by the evidence of record they should be accepted by the Supreme Court without reexamination. This is especially so when questions before the Court are concerned with determining the intent of an employer. This is a case wherein Petitioners want this Court to set aside the trial court's findings as being "clear-



ly erroneous," but they are unable to point out any evidentiary basis to warrant it.

The Petitioners argue that the Company's educational/test requirements have ". . . a vast discriminatory potential." (Pet. Brief p. 18) This contention is simply not valid since the lower court carefully guarded against a broad approval of all educational and testing requirements and restricted its decision *solely to the facts of this case*.

## ARGUMENT

### I

THE HIGH SCHOOL EDUCATION REQUIREMENT WAS ADOPTED IN GOOD FAITH TO SERVE A LEGITIMATE BUSINESS PURPOSE AND MINIMUM TEST SCORES BASED ON HIGH SCHOOL NORMS CONSTITUTE A REASONABLY SATISFACTORY SUBSTITUTE FOR DETERMINING WHETHER EMPLOYEES HAVE THE GENERAL INTELLIGENCE AND OVERALL MECHANICAL COMPREHENSION LEVEL OF THE AVERAGE HIGH SCHOOL GRADUATE.

#### *A. Legitimate Business Purpose.*

The legitimate business purpose served by the Company's requirement that incumbent employees have a high school education to be eligible for promotion into the higher skilled classifications is well supported by this record. The Company found from experience that some individuals without a high school education who entered into the higher skilled lines of progression could not progress all the way through. (A. pp. 86a, 87a) Their failure

to progress and being blocked off in the lower level of the higher skilled classifications, interfered with the Company's promotion plans.<sup>1</sup> (A. pp. 93a, 94a)

Mr. Thies testified:

"Your Honor, we've had some experiences. The nature of our business is becoming more complex all the time. We have got seven or eight computers on order. We are moving rapidly into the nuclear power area with our Leconia (Oconee) Station. We use our existing Power Stations as a nucleus pool from which to draw man power with the *skills required to move into new Stations—new locations, and they form the nucleus of the experienced people, into moving into these more complex areas. Many years ago, we found that we had people who, due to their inability to grasp situations, to read, to reason, to have a general intelligence level high enough to be able to progress in jobs—that we were—that we were getting some road blocks in our classifications in our Power Stations, and this was why we embraced the High School education as a requirement. There is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt that this was a reasonable requirement that would have a good chance of success in getting us the type of people that are required to operate the more complex things that we are faced with all the time, and this was the reason behind this. Now, the reason that we offered the test, was an effort on my part that backfired. I was trying to help people who didn't have this, to some way get around going*

<sup>1</sup>cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, 2161 (N. D. Ala. 1968).

through all this schooling—to take English and Spanish and all this other stuff, which really didn't bother me too much. If they had the intelligence to do the job, that's all I was interested in, but I didn't want to break my policy because then, I would have to take people in that *I knew didn't have the skills to do this, and they would have a hard time with it. This was the background behind it.*" (A. pp. 93a, 94a)

The Company has had poor experience with employees without a high school education in higher skilled jobs and some of the incumbents have refused to accept promotions when vacancies occurred because they felt they were unable to do the job. (A. pp. 96a, 102a-104a)

Mr. Thies further testified that employees in coal handling must be able to read manuals relating to complex machinery, operate such machinery, and *understand* orders relating thereto; and that in order to progress through the department, it was absolutely necessary to have these skills. (A. p. 105a)

The Company's expert witness, Doctor Moffie, testified that he spent a full day at Dan River actually observing personnel in the performance of jobs; that he had studied the written summary of job duties; and had spent several days with Company representatives discussing job content, including jobs at Dan River. (A. pp. 169a, 175a-180a) After doing so, he concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skilled classifications. (A. p. 181a) In so testifying, he expressed the importance of controls, logging, and "the tremendous amount of money that is involved in terms of the generators that they've

got and the necessity in maintaining these." (A. pp. 184a-186a)

The summary of job-duties in the higher skilled classifications (A. pp. 37b-71b) without more would support the Company's high school requirement as a matter of good business judgment. In addition, the Respondent's determination that it is necessary and desirable that an employee have the general intelligence level of a normal high school graduate in order to perform jobs in the higher skilled classifications is fully justified because *the minimum occupational scores in the utility industry for those jobs into which Petitioners could have been promoted generally coincide with the scores of the 50th percentile of high school graduates for both tests.* (A. pp. 168a-171a, 138b)

The evidence referred to above is uncontroverted in this record, and demonstrates that the high school requirement has a genuine business purpose and the adoption of it was in the context of good faith. As noted by the Court below, this conclusion is not only supported but actually compelled by the evidence of record. (A. pp. 216a-218a)

*Petitioners failed to adduce any evidence showing that the high school requirement did not serve a legitimate business purpose.* Their only witness, Doctor Barrett, was unable to testify that the educational/test requirement adopted by Duke did not serve a legitimate business purpose.

Petitioners contend that white employees without a high school education entered and progressed in higher classifications and Negroes similarly situated could do

likewise. The fact that some few white incumbents without a high school education had the ability to enter and progress in the higher skilled classifications does not necessarily mean that each of the four Negroes involved here has the same ability, and could likewise progress.<sup>2</sup>

The District Court found that "... jobs within each department require skills which differ in degree and kind from the skills required in the performance of jobs in other departments"; that the high school requirement was "... intended to eventually upgrade the quality of its entire work force"; and, therefore, the Company had "... legitimate reasons for its educational and intelligence standards and for applying those standards to its departmental structure." (A. pp. 33a, 34a, 36a) These findings should not be set aside unless "clearly erroneous."<sup>3</sup>

*B. Tests Are Reasonably Satisfactory Substitute For Determining Whether Employees Have General Intelligence And Overall Mechanical Comprehension Level Of Average High School Graduate.*

In July, 1965, there were some employees who could not progress into the higher skilled classifications because of the high school requirement. Acting within the spirit and intent of the Act, the Company relaxed its promotion and transfer policy by providing that incumbent employees could meet the high school education requirement by tak-

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<sup>2</sup>*Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 69 LRRM 2312, at pp. 2337, 2338 (S. D. Ohio 1968), especially where Judge Hogan said: "There is no such thing as an 'Instant Electrician'—by Court decree or otherwise." (footnote 15) See also *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, 2148, 2149 (N. D. Ala. 1968).

<sup>3</sup>See pp. 53-55, *infra*.

ing and passing the Wonderlic and Bennett Mechanical tests. (A. p. 137b)

The minimum acceptable scores utilized by the defendant are Wonderlic-20 and Bennett Mechanical-39. The score of the average high school graduate, i. e., the 50th percentile is 21.9 for the Wonderlic or nearly 2 points higher than the Company's minimum acceptable score. (A. p. 168a) For the mechanical test, the score of the average high school graduate is 39. (A. p. 171a) *The minimum occupational scores in the utility industry for jobs into which Petitioners could have been promoted were "... very much in line. . ."* with the Company's minimum scores on both tests. (A. pp. 168a-171a, 138b) In addition, when these tests were adopted by Duke, they were being used by other utility companies. (A. pp. 176a, 177a) Petitioners quote from the Wonderlic Manual which states that norms must be established for each situation in order to render it valuable. (Pet. Brief, p. 37) The foregoing shows that this is precisely what the Company did.

Based on this, the Company's expert was of the opinion that a reasonably satisfactory substitute for a high school education was to accept minimum test scores based on high school norms. (A. pp. 171a-173a) As a matter of fact, the Company "leaned over backwards" in accepting minimum test scores as a substitute for the high school requirement.<sup>4</sup> (A. p. 186a)

The Company determined that the abilities, training and skills of the average high school graduate were necessary and desirable in order for employees to perform and

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<sup>4</sup>cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, at page 2153, where the employer's psychologist testified: "In your zeal to be fair and nondiscriminating you have perhaps lowered your test standards too much."

progress in the higher skilled classifications. Surely, the  *to determine whether or not a non-high school graduate has these attributes is to test him and see if he can make the same or nearly the same scores as 50 percent of the high school graduates do on the same tests.*

Respondent submits that the Court below correctly concluded that "(T)he minimum acceptable scores used by the Company are approxixmately those achieved by the average high school graduate, which fact indicates that the tests are accepted (acceptable) as a substitute for a high school education." (A. p. 219a)

## II

THE TESTS USED BY THE COMPANY ARE PROFESSIONALLY DEVELOPED ABILITY TESTS WITHIN THE MEANING OF SECTION 703(h) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND ARE NOT ADMINISTERED, SCORED, DESIGNED, INTENDED, OR USED TO DISCRIMINATE BECAUSE OF RACE OR COLOR.

### A. *The Evidence.*

The employer's expert, Dr. D. J. Moffie, testified that he was familiar with the Wonderlic, a widely used general intelligence test, and the Bennett Mechanical, a test which measures mechanical comprehension; that in his opinion, the tests are "professionally developed" because they meet the criteria of reliability and validity; that for the purpose of administration, these are the lowest level tests and can be given by nonpsychologists; that at Dan River, the tests are given by Mr. Richard Lemons, a graduate in mechanical engineering from North Carolina State University who has had special training in the administration

of these tests; and that in preparing for this case he examined the testing facilities at Dan River and found that they met all necessary requirements of ventilation, lighting, seating arrangements, etc. (A. pp. 166a-168a)

The Petitioners' expert, Doctor Richard Barrett, testified on *direct* examination that he did not know how the phrase "Professionally Developed Test" was used in the statute. (A. pp. 139a-140a) On cross-examination, Doctor Barrett admitted that he had only read a summary of job duties and was otherwise unfamiliar with the jobs performed at Dan River, and that, except for what he learned from reading depositions, he knew nothing about how the tests used by Duke were administered, scored, or acted upon. (A. pp. 153a, 154a) He also testified on cross-examination: "Since each employer faces a situation that is in some respects unique, *he and he alone* is in a position to develop . . . tests and . . . procedures which will help him hire from the available labor force, the best employees, *regardless of race.*" (A. p. 153a)

There is no evidence of record showing any difference or distinction as between incumbent Negroes and whites in the tests used or in the administration and scoring of such tests. In fact, the evidence shows that both white and Negro incumbents have taken the tests and failed.<sup>5</sup> (A. p. 91a)

On pages 19 and 20 of their brief, Petitioners point out three questions on the Wonderlic test and argue that the ability to answer such questions is related to "formal schooling" and "cultural background" which Negroes have been denied. There are also 47 other questions of which

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<sup>5</sup>cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, 2157.



a testee must answer less than half, i. e., twenty.<sup>6</sup> Petitioners mount a broadside attack on the Company's educational/test requirement, contending it is discriminatory because there is no evidence that the Company studied, evaluated or validated the requirement for job performance needs.<sup>7</sup> They are unable to cite legislative history or case law in support of their contention. Instead, they cite statistics, sociological treatises, studies, textbooks, magazine articles, and proceedings and hearings before Federal agencies, none of which were introduced into evidence for exposure to the light of cross-examination. Indeed, Respondent submits that such evidence would have been incompetent, inadmissible, and prejudicial unless the authors of same were presented for cross-examination by the Company. Based on their argument alone, they ask this Court to strike down the use of tests which the uncontradicted evidence of record shows to be professionally developed and not administered, scored, designed, intended or used to discriminate because of race or color within

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<sup>6</sup>Does it take "formal schooling" or "cultural background" to know that November is the eleventh month of the year (Question No. 1) or that chew is related to teeth as smell is to nose (Question No. 7) or that if 3 lemons sell at 15 cents, one and one-half dozen would cost 90 cents (Question No 12)? (A. p. 102b)

<sup>7</sup>cf. *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, at p. 2156, where judge Allgood said: "The courts must decide the cases which come before them on the evidence and not on abstract propositions. For a court to find racial discrimination in the use of aptitude tests which have not been validated, there should be at least some evidence that the use of an aptitude test which has not been validated has resulted in discrimination and not merely the abstract proposition that test validation is desirable." At page 2157, he further stated: "On the record in this case, the sum and substance of the matter is that the plaintiff would have the court enter a finding of racial discrimination on the basis, without more, of the hypothetical proposition that the use of aptitude tests without validation necessarily equals discrimination, and this the court cannot properly do."

the meaning of Section 703(h) of the Act. As noted by Judge Allgood in *U. S. v. H. K. Porter Co.*, 296 F. Supp. 40, 70 LRRM 2131, at page 2148: "... the arguments of counsel, no matter how compelling, are not acceptable substitutes for evidence."

The entire testimony of Doctor Barrett indicates the inherent difficulties and the nebulous nature of testing in general.<sup>8</sup> With respect to validation, for example, Doctor Barrett testified that it should be undertaken "where possible"; that it wasn't "essential"; and that tests could be validated in ways other than job relatedness. (A. pp. 133a, 149a-151a) One Federal District Court recently noted the difficulties associated with testing.<sup>9</sup>

Petitioners claim that an "intent" to screen out Blacks can be inferred from the *timing* of the Company's decision to install tests. This inference is totally unwarranted.<sup>10</sup> The tests were used as a substitute for or in lieu of the high school education requirement *which was adopted before the four black workers involved here were even em-*

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<sup>8</sup>See also Petitioners' Brief pp. 33-36.

<sup>9</sup>On the general subject of testing, Judge Smith in *Colbert v. H-K Corporation*, — F. Supp. —, 2 FEP Cases 951 (N. D. Ga. 1970) at page 955 said: "The profession of psychological testing is relatively new and no certain standard for validating tests has been proscribed. With considerable 'jargon' the psychologists themselves disagree. Without the immense task and considerable expense of tailor-made tests, the average small employer is relegated to the use of standardized tests."

<sup>10</sup>cf. *U. S. v. H. K. Porter Co.*, *supra*, at page 2160, where Judge Allgood stated: "It is a reasonable assumption that there is more than one employer in this country which began using aptitude tests at the time that jobs were integrated or at the time that Title VII was enacted. However, that could hardly be said to constitute discrimination in and of itself, particularly in light of the amendment which was adopted in the Senate to authorize the non-discriminatory use of professionally developed ability tests."

*ployed by Duke*. How can they possibly complain that the Company *intended* to screen out Blacks by adopting a test requirement which provided them an alternative not previously available as an additional route to promotional consideration?

In this connection, Petitioners further argue that the burden of the test requirement fell *primarily* on Negroes in the Labor Department and the Company knew it. If Petitioners had sufficiently plumbed the record, it would have been easy enough to ascertain that at the time the Company agreed to accept minimum test scores as a substitute for the high school requirement there were eleven (11) Negroes and nine (9) white employees without a high school education affected by the change in policy.<sup>11</sup> (A. pp. 126b, 127b, 104b-109b) The number of Negroes affected was *not* disproportionately greater than the number of whites so affected. The practice was made equally applicable to all employees similarly situated. There is no showing in this record that the intent of accepting minimum test scores in lieu of the high school education requirement was to discriminate against Negroes because of race or color. In fact, the *Petitioners' own evidence* shows that the testing policy "was designed to include rather than exclude" *all* employees without a high school education who were employed prior to September, 1965. (A. pp. 130a, 21b) The *Petitioners' own evidence* further shows that there are "... three (3) standardized non-

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<sup>11</sup>The Court below ordered relief for six Negro employees hired prior to adoption of the high school requirement. Willie Boyd completed a course accepted and recognized by the Company as a high school equivalent. On December 8, 1969, he was promoted to a supervisory position as foreman of the Labor Department. See A. pp. 210a, 226a. This leaves only four (4) Blacks without a high school education affected by the educational/test requirement.

discriminatory alternatives . . .”—(1) high school education, (2) minimum test scores in lieu of high school education and (3) Tuition Refund Program which can be used to obtain a high school education or its equivalent—by which any employee, Negro or white, can qualify for consideration for promotion into the higher skilled classifications. (A. pp. 20b-21b) Even though the District Court found that at sometime prior to the effective date of the Act Negroes were relegated to the Labor Department, it also found that since the effective date of the Act the high school-test requirement was fairly and equally administered and that the requirement was made applicable “. . . to a departmentalized work force without any *intention or design* to discriminate against Negro employees.” (A. pp. 34a)

Petitioners argue that the language of Sections 703(a)-(2) and 703 (c)(2) of Title VII which define unlawful employment practices as those which “tend to deprive” or “adversely affect” employees because of race, without reference to the employer’s reasons for such practices, means that Congress declared unlawful all employment practices which *result* in discrimination; and that if such a result occurs the employer’s intent is immaterial. In his minority views on page 26 of Senate Report No. 1111 (May 8, 1968), Senator Fannin had this to say with respect to Section 703(h):

“Despite this language and the clear legislative intent appearing in the debates, the Commission decided in a recent case that the phrase ‘intention to discriminate’ did not really mean what it appeared to say. What was important was the result.”

The Company does not agree that the employer’s intent under Sections 703(a)(2) and 703(c)(2) is immaterial,

but even if it is assumed *arguendo* that it is correct with respect to those sections, it is obviously erroneous with respect to Section 703(h). Section 703(h) provides that “(N)otwithstanding any other provision of this title” employers may use *any* professionally developed ability test so long as it is not “designed, intended, or used” to discriminate on the basis of race, color, religion, sex or national origin. The fact that Sections 703(a)(2) and 703(c)(2) *may* be susceptible of an interpretation that Congress intended to emphasize *result rather than motive* is not determinative as to 703(h) because the plain language of 703(h) removes it from concomitant consideration with any other section of the title and makes it an island unto itself. A general intelligence or ability test might well result in discrimination against employees who are “culturally deprived” which fact is clearly recognized by the legislative history approving the use of such tests. (See pp. 27-40, *infra*) The crucial inquiry is whether the employer “designed, intended, or used” such tests to discriminate on the basis of race, color, etc. To hold an employer liable for giving and acting upon the results of such tests, the claimant must at the very least adduce some evidence which shows, either directly or inferentially, that the employer “designed, intended, or used” the tests to discriminate on the basis of race, color, etc. This record contains no such evidence.

Petitioners further contend that tests are “used” to discriminate against the four Blacks involved in this case who do not have a high school education. These employees and the dates hired are as follows: David Hatchett (6-24-57); Eddie Broadnax (2-13-61); Willie Griggs (3-11-63); and C. E. Purcell (6-3-63). (A. pp. 109b, 126b, 127b) Surely, they cannot expect to be transferred

to a department into which the Company would not have initially hired them and the education/test requirement is not discriminatory as to them. (See A. pp. 26a, 27a) They were hired as laborers because they could not qualify for jobs in other departments. Every Negro in the Labor Department is therefore not relegated to said department because of race or color. The tests were adopted to give these incumbent employees a short-cut to promotional consideration—an additional chance (others being the Tuition Refund Program and the GED equivalent) that had not been previously available to them.

In ordering relief for the six Negroes without a high school education who were hired before adoption of the educational requirement, the Court below held that in fashioning a remedial decree the District Court should order that seniority rights of these six employees should be considered on a plant-wide rather than a departmental basis. (A. p. 225a) As previously indicated, there are nine white employees without a high school education who were also affected by the educational requirement. All those employees have longer plant-wide seniority than the four Blacks involved here. (A. pp. 104b-109b, 126b, 127b) Therefore, a waiver of the educational/test requirement and application of plant-wide rather than departmental seniority with respect to the four Blacks would be of no force and effect. Under the relief contemplated by the Court below, each of the white employees affected by the educational/test requirement in relation to the four Blacks would have first choice when vacancies occurred in the "inside jobs" because all the whites have longer plant-wide seniority. The Company submits that it is *factually impossible* to "use" the tests to discriminate against the four Blacks involved here.

*Based on the evidence of record*, the trial court found that the tests were "professionally developed" to determine whether a person has a general intelligence and overall mechanical comprehension level; that the Company used the tests to determine whether an employee has the general intelligence and overall mechanical comprehension of the average high school graduate regardless of race, color, religion, sex or national origin; and that the tests were therefore in compliance with the Act. (A. p. 38a) There is absolutely no evidence in this record which would support a finding that the Company designed, intended, or used the test to discriminate on the basis of race, color, religion, national origin or sex. Instead, the competent, material and substantial evidence in view of the entire record as a whole impels the conclusion that the tests were "designed" to determine a person's general level of intelligence and overall mechanical comprehension; and that the tests were "used" as a substitute for a high school education to determine if an individual had the overall general intelligence and mechanical comprehension level of the average high school graduate with no "intent" to discriminate on the basis of race, creed, color, national origin or sex.

#### *B. Legislative History.*

Petitioners contend that the educational/test requirement violates Title VII because it unequally excludes Blacks from employment opportunities and therefore Title VII requires that it be job-related. The legislative history of the Act undermines the very foundation of their argument.

On February 26, 1964, a hearing examiner for the Illinois Fair Employment Practices Commission ordered an

employer, Motorola, Inc., to discontinue the use of a preemployment general intelligence test.<sup>12</sup> The test had been given to a Negro applicant for a job as analyzer and phaser and the examiner found that use of such a test was a denial of equal employment opportunity because Negroes were "culturally deprived" and therefore placed at a "competitive disadvantage." The test involved in the *Motorola* case measured verbal comprehension and simple reasoning ability as does the Wonderlic.<sup>13</sup>

On April 8, 1964, Senators Clark and Case, floor managers for the bill, introduced into the Congressional Record an *interpretative* memorandum (hereafter Clark-Case Memorandum), prepared by the Justice Department, which provides, in part, as follows:

"This exception must not be confused with the right which all employers would have to hire and fire on the basis of *general qualifications for the job, such as skill or intelligence.*"

\* \* \*

"To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. *Any other criterion or qualification for employment is not affected by this title.*"

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"*There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of*

<sup>12</sup>Decision reprinted at 110 Cong. Rec. 5662-5664, March 24, 1964.

<sup>13</sup>110 Cong. Rec. 13494, 13495, June 11, 1964.



*some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."*<sup>14</sup>

Early in the Senate debate on the House-approved bill (H. R. 7152), Senator Dirksen submitted a memorandum questioning numerous provisions in the bill. On April 8, 1964, Senator Clark had printed into the Congressional Record his response to those questions which stated, in part:

"Objection: The language of the statute is vague and unclear. It may interfere with the employers' *right* to select on the basis of qualifications.

"Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin); any other criteria or qualification is untouched by this bill."

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"Objection: The bill would make it unlawful for an employer to use *qualification tests based upon verbal skills and other factors which may relate to the environmental conditioning of the applicant. In other words, all*

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<sup>14</sup>110 Cong. Rec. 7213, April 8, 1964. (Emphasis added)

*applicants must be treated as if they came from low-income, deprived communities in order to equate environmental inequalities of the culturally deprived group.*

*"Answer: The employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance."*<sup>15</sup>

The House version of the Civil Rights Act of 1964 did not contain any reference whatsoever to tests. The test amendment, Section 703(h), was added during extended debate on the Senate floor.

On May 19, 1964, Senator Tower sponsored his original amendment (No. 605) which provided:

*"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give any professionally developed ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—"*

\* \* \*

*"(2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee's race, color, religion, sex, or national origin."*<sup>16</sup>

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<sup>15</sup>110 Cong. Rec. 7218, April 8, 1964 (Emphasis added).

<sup>16</sup>110 Cong. Rec. 11251, May 19, 1964 (Emphasis added).

Prior to introducing his original amendment, Senator Tower said:

"This amendment arises out of my concern about the ramifications of the Motorola-Illinois FEPC case. I have discussed that case in great detail for the Senate and will not repeat myself here.

"Let me only say that it is indicated by the Motorola case that an Equal Employment Opportunities Commission operating under title VII of the civil rights bill might attempt to regulate the use of tests by employers.

"You will recall that in the Motorola case an FEPC examiner found the test used to select employees to be discriminatory to culturally disadvantaged groups."<sup>17</sup>

When Senator Tower called up his original amendment (No. 605) on June 11, 1964, he stated:

*"It is an effort to protect the system whereby employers give general ability and intelligence tests to determine the trainability of prospective employees. The amendment arises from my concern about what happened in the Motorola FEPC case. . . ."*

\* \* \*

"Let me say, only, in view of the findings in the Motorola case, that the Equal Employment Opportunity Commission, which would be set up by the act, operating in pursuance of title VII, might attempt to regulate the use of tests by employers."

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*"If we should fail to adopt language of this kind, there could be an Equal Employment Opportunity Commission ruling which would in effect invalidate tests of*

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<sup>17</sup>110 Cong. Rec. 11251, May 19, 1964.

various kinds of employees by both private business and Government *to determine the professional competence or ability or trainability or suitability of a person to do a job.*"<sup>18</sup>

In the Senate debate that ensued, Senator Case also complained that the amendment as proposed would allow an employer to give discriminatory tests so long as they were professionally designed.<sup>19</sup> Apparently, those Senators in favor of Title VII thought that the Clark-Case Memorandum and the Clark response to the Dirksen questionnaire should have laid to rest all concern about the *Motorola* case and insisted that the amendment was redundant and unnecessary because such tests were already "legal."<sup>20</sup>

During the debate, Senator Lausche asked Senator Humphrey:

"Will the Senator from Minnesota read the language in title VII that would make these tests valid and not subject to the charge of being discriminatory against applicants for jobs and applicants for promotions?"<sup>21</sup>

Receiving no direct answer to his question, Senator Lausche once again asked:

"If title VII contains no provision declaring under what circumstances such tests shall be valid, where in the bill are there provisions to make these tests valid, if the Senator can answer that question?"<sup>22</sup>

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<sup>18</sup>110 Cong. Rec. 13492, June 11, 1964 (Emphasis added).

<sup>19</sup>110 Cong. Rec. 13504, June 11, 1964.

<sup>20</sup>*id.*

<sup>21</sup>*id.*

<sup>22</sup>*id.*

Still unable to refer to a specific provision of the Act which allowed an employer to give general intelligence tests, Senator Humphrey responded that such tests were legal under the Act simply because they had not been declared invalid. Thereafter, the colloquy<sup>23</sup> between Senators Miller and Humphrey indicated that supporters of the bill thought that the use of general intelligence tests was permitted by the *present* provision of Section 703(h) which provides that it is not an unlawful employment practice to apply different standards of employment pursuant to "... a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production. . . ."

Still not satisfied and intent on pressing his point, Senator Lausche queried once again:

"Where in the bill are there provisions to insure that tests *such as the one in the Motorola case are allowed?*"<sup>24</sup>

Neither Senator Miller nor Senator Humphrey could point to language in the bill which expressly allowed the use of tests "... such as the one in the Motorola case."

There is little doubt that those who opposed as well as those who supported the bill shared a common, genuine concern over the decision of the hearing examiner in the *Motorola* case, and did not want to enact legislation which might sire such a result. In fact, Senator Case said that the Senate leadership's vote against Senator Tower's *first* amendment did not mean "... approval of the *Motorola* case or that the bill embodies anything like the action

<sup>23</sup>*id.*

<sup>24</sup>*id.* (Emphasis added)

taken by the examiner in that case. It is not necessary to have this amendment adopted in order to permit that result. *Nothing in the bill authorizes such action as in the Motorola case.*"<sup>25</sup>

The foregoing debate took place on Thursday, June 11, 1964. So far as Respondent can determine, nothing concerning the Tower amendment appears in the Congressional Record of June 12, 1964. On Saturday, June 13, 1964, Senator Tower called up his amendment No. 952 which was a modified version of his original amendment. Upon calling the modified amendment, the following colloquy took place between Senator Tower and Senator Humphrey, the principal floor leader in support of the Act:

"Mr. TOWER. \* \* \* It is my understanding that the present language has been cleared through the Attorney General, the leadership, and the proponents of the bill.

"I therefore urge its adoption. I ask for the yeas and nays."

\* \* \*

"Mr. HUMPHREY. Mr. President, I think it should be noted that the Senators on both sides of the aisle who were deeply interested in title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title.

"I do not think there is any need for a roll call. We can expedite it. *The Senator has won his point.*

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<sup>25</sup>*id.* (Emphasis added)

"I concur in the amendment and ask for its adoption." 110 Congressional Record 13724, June 13, 1964. (Emphasis added)

The "point" won by Senator Tower and acknowledged by Senator Humphrey was the insertion in Title VII of language which clearly evinced a Congressional intent that general ability and intelligence tests were lawful under the Act. Prior to the Tower amendment, Title VII did not contain a single reference to tests. Supporters of the Tower amendment, despite assurances of the proponents of Title VII, insisted that the bill contain explicit provisions which would *insure* that an employer could lawfully use tests such as the one in the *Motorola* case. Apparently, Senators on both sides of the aisle saw Senator Tower's "point" and agreed with him.

In May, 1968, an amendment requiring that tests be job-related was proposed and defeated.<sup>26</sup> The principal purpose of the bill was to give the EEOC authority to issue judicially enforceable cease and desist orders. It was referred to the Senate Committee on Labor and Public Welfare where it underwent several changes, one of which was the foregoing amendment. In explaining the changes made by the Committee, it was stated that the bill would amend present Section 703(h) governing the "permissible" use of ability tests so that an employer could use such tests "only" if "directly related" to the "position concerned."<sup>27</sup> In stating his minority views, Senator Fannin noted that the EEOC's interpretation of the test pro-

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<sup>26</sup>Senate Report No. 1111, May 8, 1968.

<sup>27</sup>*id.*, at pages 10, 53.

vision was contrary to the legislative history.<sup>28</sup> In concluding his views, Senator Fannin agreed that discrimination in employment could not be tolerated and stated in effect that the bill would "abolish ability testing." The enactment of the legislation, he said, would "erode the orderly foundations essential to business enterprise and weaken the economic structure of this country."<sup>29</sup> The rejection of this amendment *requiring* that tests be job-related clearly demonstrates that Congress never intended to impose such a requirement in the first place.<sup>30</sup>

In support of Petitioners, the Solicitor General as *amicus curiae* also takes the position that the legislative history of 703(h) prohibits the use of all tests unless they are job-related. In support of this contention, he cites the Clark-Case Memorandum and statements of Senators Ervin,

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<sup>28</sup>*id.*, at page 25: "In furtherance of this policy and guided by the above interpretation, the Commission has taken the position that employment or ability tests are unlawful unless 'culturally validated.' This—despite section 703(h) of the Civil Rights Act which specifically provides that an employer may act upon the result of *any* 'professionally developed ability test' and despite the clear legislative history." (Emphasis added)

<sup>29</sup>*id.* at page 41.

<sup>30</sup>*cf. Western Union Telegraph Company v. Lenroot*, 323 U. S. 490, 505, 509, 89 L. Ed. 414, where Mr. Justice Jackson, speaking for this Court, said: "But had it determined to reach this employment, we do not think it would have done so by artifice in preference to plain terms. It is admitted that it is beyond the judicial power of innovation to supply a direct prohibition by construction. We think we should not try to reach the same result by a series of interpretations so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process. After all, this law was passed as the rule by which employers and workmen must order their daily lives. To translate this Act by a process of interpretation into an equivalent of the bills Congress rejected is, we think, beyond the fair range of interpretation. Declining that, we cannot sustain the Government's bill of complaint."



Smathers, Holland, Hill, Tower, Talmadge, Fulbright and Ellender. (Brief of United States, pp. 23-25) All those Senators were opposed to Title VII in principle and wanted it stricken from the Civil Rights Act of 1964 in its entirety. Those statements were made in that context between March 14, 1964 and April 29, 1964—long before Senator Tower even introduced his first amendment on May 19, 1964, and enactment of the modified version on June 13, 1964.

Preceding the quoted remark on page 25 of the United States' brief, Senator Fulbright had said:

"I cannot imagine anything more idiotic than to say that an aptitude test is not a legitimate way for a Company to determine those who are fitted for employment in that Company."<sup>31</sup>

The colloquy between Senators Tower and Talmadge are taken out of context. The major thrust of their discussion was the threat posed by the bill which was, they believed, the unleashing of unbridled authority in a Federal Commission to meddle in and eventually control the relationship of *private* employers and their employees. This was a major concern of all those Senators opposed to Title VII. At any rate, a careful reading of that memorandum and statements of those Senators reveal that they were directed not to the proposition of requiring the use of job-related tests, but rather to *the right of an employer to determine job qualifications for himself*. To be sure Section 703(h) permits employers to insist on job-related tests, but nowhere in the legislative history does there appear a requirement that employers must use only those tests which are job-related. If Congress had so intended, it could have

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<sup>31</sup>110 Cong. Rec. 9600, April 29, 1964.

easily inserted language making such intent clear and unmistakable.

Senator Tower's first amendment cannot be read as requiring that tests be job-related as suggested by the Solicitor General and Petitioners. (Brief of United States p. 29; Pet. Brief p. 50) *The amendment relates to the business or enterprise, not to specific jobs.* Moreover, the stated purpose of the amendment was "... to protect the system whereby employers give *general ability and intelligence tests to determine the trainability of employees.*"<sup>32</sup> As stated by Senator Tower, it was "not an effort to weaken the bill" or to allow the use of discriminatory tests. Nothing in the amendment prevents an employer from using job-related tests. It is one thing to say that 703(h) *permits* the use of job-related tests but quite a different thing to say Congress *required* the use of such tests.

Respondent submits that this summary of the legislative history is distorted and the inference drawn therefrom is therefore totally unwarranted.

The Solicitor General also argues that Senator Tower's substitute amendment was adopted after persuading the bill's sponsors that the redraft would require job-related tests. (Brief of United States p. 29) Senator Tower's first amendment was called up on June 11, 1964, and the second amendment was enacted on June 13, 1964. The Congressional Record of June 12, 1964, does not show that Senator Tower made any representation whatsoever to supporters of the bill that his modified amendment *required* that tests be job-related. Indeed, use of the words "*any* professionally developed ability

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<sup>32</sup>110 Cong. Rec. 13492, June 11, 1964 (Emphasis added).

tests" indicates that Congress intended that the employer should have the broadest possible range of selection in determining what tests he should use so long as it was not "designed, intended or used" to discriminate.

Prior to the vote on the original amendment, Senator Tower stated: "My amendment would not legalize discriminatory tests. It would not make discriminatory tests permissive."<sup>33</sup> To clear this up, Senator Tower's second amendment, which was "... *cleared through the Attorney General, the leadership and proponents of the bill*"<sup>34</sup> allowed the use of general intelligence and ability tests so long as the tests were not "designed, intended or used" to discriminate on any of the prohibited bases.

When the modified amendment was called up, Senator Tower said:

"This is similar to an amendment which I offered a day or two ago, and which was, I believe, agreed upon in principle. But the language was not drawn as carefully as it should have been."<sup>35</sup>

Under the original amendment, a test could be "designed" to test for general intelligence and ability, but then "used" with the "intent" to discriminate. This is what Senator Tower was referring to when he said the language was not drawn as carefully as it should have been. The "principle" that had been agreed upon was that general intelligence and ability tests were permissible under the Act and the amendment was needed to clarify the intent of Congress in that regard.

<sup>33</sup>110 Cong. Rec. 13504, June 11, 1964.

<sup>34</sup>110 Cong. Rec. 13724, June 13, 1964 (Emphasis added).

<sup>35</sup>*id.*

In view of the foregoing, Respondent respectfully submits that Congress clearly intended that employers could lawfully use general intelligence tests such as those involved in this case provided they are not intended, designed or used to discriminate. Supporters of the bill claimed that general intelligence and ability tests were allowed under the Act *even without Senator Tower's amendment*. Moreover, there is simply no evidence in this record which would support a finding that the tests involved here were intended, designed, or used to discriminate. *A fortiori*, the uncontradicted evidence of record is that they were not. (See pp. 19-27 *supra*; A. pp. 216a-219a)

The majority decision below concisely and succinctly reviews the legislative history of Section 703(h) of Title VII. The decision of the EEOC that tests *must* be related to a particular job or group of jobs and properly validated is clearly contrary to the legislative history of Section 703(h) as the Court below correctly concluded:

"At no place in the Act or in its legislative history does there appear a requirement that employers may utilize only those tests which measure the ability and skill required by a specific job or group of jobs. In fact, the legislative history would seem to indicate clearly that Congress was actually trying to guard against such a result." (A. pp. 222a, 223a)

The Court's conclusion is fortified by the fact that in May 1968 an amendment to Section 703(h) requiring a "direct relation" between a test and a "particular position" was proposed and defeated. Senate Report No. 1111, May 8, 1968. In view of such clearly compelling legislative history, it would have been patent error for the Court to conclude otherwise.

## III

THE COURT BELOW PROPERLY CONCLUDED THAT RESPONDENT'S EDUCATIONAL AND TESTING REQUIREMENTS WERE LAWFUL, NON-DISCRIMINATORY EMPLOYMENT CRITERIA UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AND THE COMPANY HAD LEGITIMATE BUSINESS REASONS FOR ESTABLISHING SAID CRITERIA.

Petitioners contend that where testing and educational requirements are not specifically related to a particular job or group of jobs the employer cannot have legitimate business reasons for adopting such requirements. The other side of the coin is that where a private employer determines that educational and test requirements are necessary to upgrade the quality of its work force so as to safely and efficiently operate his business such requirements are job related, albeit, not specifically related to the particular job or class of jobs to be performed. Once a private employer makes such a determination and the evidence supports that determination, his business reasons for doing so are legitimately established, absent any showing of an intent to discriminate.

The lower court carefully guards against a broad approval of all educational and testing requirements and restricts its decision solely to the facts of this case.

*A. High School Education Requirement.*

The court below concluded that six Negro employees who were hired prior to adoption of the high school education requirement were discriminated against because their white *counterparts* without a high school education had entered and progressed in the higher skilled classifications. Four Negroes without a high school education were hired

as laborers *after* that requirement was adopted by the Company. (A. pp. 104b-109b, 126b, 127b). *The Four Negroes hired after adoption of the high school requirement have no white counterparts* because the Company has not hired a single white person without a high school education for employment in the higher skilled classifications since the requirement was adopted. (A. pp. 104b-109b, 126b, 127b). Had it done so, the four Negroes involved here might logically contend that they were victims of discrimination and as to them the Court below correctly concluded that:

"These employees were hired subject to the educational requirement; each accepted a position in the Labor Department with his eyes wide open. Under this valid educational requirement these four plaintiffs could have been hired only in the Labor Department and could not have been promoted or advanced into any other department, irrespective of race, since they could not meet the requirement. Consequently, it could not be said that they have been discriminated against. Furthermore, since the testing requirement is being applied to white and Negro employees alike as an approximate equivalent to a high school education for advancement purposes, neither is it racially discriminatory." (A. pp. 223a, 224a)

The legislative history shows that discrimination based on educational qualifications does not violate Title VII of the Act.

On March 26, 1964, Senator Case, one of the Act's leading sponsors, had printed into the Congressional Record a memorandum (intended to clear up any "misconceptions") which unequivocally stated that Title VII was in no way intended to interfere with the employer's "right"

to determine his own job qualifications.<sup>36</sup> In commenting on that memorandum on April 8, 1964, Senator Case said that the bill "expressly protects the employer's *right* to insist that any applicant meet the applicable job qualifications. That is expressly provided for in Title VII."<sup>37</sup> The Clark-Case Memorandum made it crystal clear that an employer has the unqualified *right* to determine job qualifications and to hire and promote employees based on those qualifications. (See pp. 29, 30, *supra*) In addition, Senator Humphrey said during the Senate debate on June 9, 1964: "The Employer will outline the qualifications to be met for the job. *The employer, not the Government, will establish the standards.*"<sup>38</sup>

Petitioners' brief is completely devoid of any legislative history which would support their position that the Company's high school education requirement constitutes a violation of Title VII. In support of their position, they cite the fact that the 1960 census reveals that only 12 percent of North Carolina Negro males completed high school as compared to 34 percent of North Carolina white males. (Pet. Brief page 20) It must be presumed that Congress knew of the 1960 census when it passed this legislation which was to become effective on July 2, 1965, more than five years later.<sup>39</sup> Had Congress intended to preclude the use of educational requirements by employers, it could have easily done so in clear and unmistakable language.

<sup>36</sup>110 Cong. Rec. 6416, March 26, 1964.

<sup>37</sup>110 Cong. Rec. 7246, April 8, 1964. (Emphasis added)

<sup>38</sup>110 Cong. Rec. 13088, June 9, 1964 (Emphasis added).

<sup>39</sup>2 U. S. C. §2(a) directs the President to transmit to Congress decennially a statement showing the whole number of persons in each state so that Congress can perform its constitutional duty to reapportion the House of Representatives.

Respondent submits that Congress intended to preserve management's prerogative to determine job qualifications; and, therefore, made it clear that an employer can set his qualifications, educational or otherwise, as high as he likes without violating Title VII of the Act so long as they are applied without discrimination. The Petitioners should address themselves to Congress, not this Court, for the result they seek.

On October 2, 1965, the General Counsel of the Equal Employment Opportunity Commission (EEOC) issued an opinion stating that discrimination based on educational qualifications does not violate Title VII of the Act (A. p. 147b). Petitioners cite a subsequent decision of the EEOC on December 6, 1966, issued almost two months after the Complaint was filed in this case, (Pet. Brief, App. p. 3) as holding that unless educational requirements are related to job performance they violate Title VII of the Act. The only thing *decided* by the EEOC was that reasonable cause existed to believe that an employer who owned a food processing plant (where the great majority of jobs required unskilled personnel) was discriminating against Negroes by administering a test not related to job requirements.

Petitioners cite *Parham v. Southwestern Bell Telephone Co.*, — F. Supp. —, 2 FEP Cases 40 (E. D. Ark. 1969) for the proposition that since tests were not operating unfairly as a barrier to Black employment the Court saw no necessity of inquiring into the job-relatedness of the tests. (Pet. Brief, p. 24, footnote 18) Petitioners failed to point out that the District Court in that case also held that the employer's requirement of a high school education was not inherently discriminatory as *tending* to disqualify Negroes. In this regard, Chief Judge Henley said at page 46:



"It is urged that defendant's requirement that all of its employees must have completed a high school education is irrelevant to the needs of defendant's business and bears more heavily upon Negroes than upon whites. . . .

"The Court cannot accept those arguments. In the last analysis those arguments amount to a contention that an employment criterion is inherently discriminatory and unlawful if in its operation it bears more heavily on an underprivileged ethnic or racial group than it bears on members of race or group which is dominant in the society, even though it may disqualify some members of the latter group. It is said that more Negroes drop out of school for socioeconomic reasons than do white students. . . .

"That argument may be interesting sociologically, but this Court is not willing to read into the Act any requirement that an employer tailor his hiring requirements to meet the needs of deprived minorities. If he adopts his criteria in good faith and for what reasonably appear to him to be valid reasons, and if the criteria are not themselves based on race, the Court does not think that they are prohibited by the Act merely because many Negroes on account of cultural and economic deprivations may not be able to meet them."

Insofar as Respondent can determine, *Parham* is the only judicial determination that a high school education requirement does not violate Title VII.

The Petitioners are unable to cite a single decision or legislative history to support their contention that educational requirements violate Title VII of the Act. *A fortiori*, they are unable to cite a decision of the agency charged with administration and enforcement of the Act that so holds.

### B. Tests.

Petitioners cite the following District Court cases as authority for the proposition that tests (and educational requirements) which are not job-related are unlawful under Title VII of the Civil Rights Act of 1964: *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 355, 2 FEP Cases 371 (D. C. Mass. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 69 LRRM 2313 (S. D. Ohio 1968); *U. S. v. H. K. Porter Co.*, *supra*; *Penn v. Stumpf*, 308 F. Supp. 1238, 2 FEP Cases 391 (N. D. Calif. 1970); *Colbert v. H-K Corporation*, — F. Supp. —, 2 FEP Cases 951 (N. D. Ga. 1970) appeal noticed August 3, 1970; *Gregory v. Litton Systems, Inc.*, — F. Supp. —, 2 FEP Cases 821; and *Hobson v. Hansen*, 296 F. Supp. 401 (1967). In each instance their claim is unfounded.

Petitioners cite *Dobbins*, *supra*, for the proposition that a test is not "professionally developed" unless it is related to job performance. Section 703(h) provides that it is not an unlawful employment practice for an *employer* to give and act on the results of a professionally developed ability test. *This section was enacted to provide exemptions for employers only, not labor unions.* *Dobbins* has to do with tests being given for membership in a labor organization or in connection with a referral system. The question of "professionally developed tests" within the meaning of Section 703(h) was not before the Court in that case. Moreover, as indicated by the Court below, it was clear in that case that the purpose of the tests was to discriminate, which is not true in this case. (A. p. 219a)

In *Porter*, *supra*, the question of job-related tests was not at issue because the Court found that the tests were related to the abilities required for performance of jobs. After stating the thesis of the EEOC guidelines, Judge Allgood said at 296 F. Supp. p. 78:

*"Accepting this interpretation for purposes of analysis, and applying it to the record in this case, the result is that there is not sufficient evidence here from which it could be properly said that the SRA and the USES tests used by the Company do not fairly measure the knowledge or skills required by the jobs."* (Emphasis added)

Even though the Court stated that it agreed in principle that aptitudes measured by a test should be relevant to aptitudes involved in the performance of jobs, Judge Allgood *did not hold* that Section 703(h) required that tests be specifically job-related and the quote from that case in Petitioners' Brief at page 24 is appropriately termed "dictum."

*Arrington, supra*, and *Penn, supra*, are equally inapposite and clearly distinguishable in that the action was brought under the Civil Rights Acts of 1870 and 1871 and a governmental agency was the employer in both cases. Neither *Penn* nor *Arrington* would support Petitioners' contention that Section 703(h) of Title VII requires that tests used by *private* employers must be related to specific jobs. In addition, *Penn* was before the Court on Plaintiffs motion to dismiss and *Arrington* came to the Court on Plaintiff's motion for preliminary injunction. Neither case has been decided on its merits.

In *Gregory* the policy under which the plaintiff was denied employment was that of excluding applicants who had been arrested a number of times even though there were no convictions. The Court held that such policy was discriminatory under Title VII because there was no *showing* that the policy had a legitimate business purpose. There the Court *found* no business reason for the policy while in the case at bar the trial court found that Duke had legitimate business reasons for the educational/test requirement.

In *Hobson v. Hansen*, *supra*, the Court found as a fact that standard aptitude tests accurately measured the ability of white middle class children but that such tests were less precise in measuring the ability of Negro children who were disadvantaged because of impoverished circumstances. This was a school segregation case in which the issues raised and legal conclusions reached were bottomed on constitutional principles. Even if the trial court made such a finding in this case, it could and should declare that the tests in use here are lawful under the Act because the legislative history clearly shows that Congress intended that general intelligence and ability tests were permitted under Title VII even though because of differences in background and education some groups are able to perform better on the tests than members of other groups. (See pp. 27-40, *supra*)

In *Colbert v. H-K Corporation*, *supra*, Section 703(h) was before the Court for interpretation. The employer was using a general intelligence test which the plaintiff contended violated Section 703(h) because it was not job-related. The trial court noted that while the typing test which was given plaintiff was job-related under any theory, the use of intelligence and aptitude tests was far more complicated. The trial judge also stated that in any contest between the wording of the statute and the EEOC guidelines the Court would "opt(s)" for the construction placed on Section 703(h) by the Fourth Circuit in the case at bar. The Court noted that *Arrington* held that general intelligence tests must be job-related to specific skills required and then stated at 2 FEP Cases p. 954:

*"If such principle is accepted in its ultimate so as to provide that any tests (other than mechanical ones) on which Negroes perform less well than whites because of a previous disadvantaged education may not be used as hiring or promotion criteria, then all educational, intelli-*

*gence, personality, or general aptitude tests might be invalidated. From the legislative history, this was not the intent of the Act.*

"Even if the premise of job-related tests is accepted, the difficulty lies in a precise definition of job-relationship. It is one thing to say that such general tests may not bear a reasonable relationship to the position of a driver or collector as in *Arrington* or woodyard worker as in *Local 189*, or essentially manual jobs as in *United States v. H. K. Porter Company*, 296 F. Supp. 40, 1 FEP Cases 515, 70 LRRM 2131 (N. D. Ala. 1968). It is conceivable that it may be demonstrated not to bear a reasonable relationship to the position of policeman when evidence is presented in the case of *Penn v. Stumpf*, 308 F. Supp. 128, 2 FEP Cases 391 (N. D. Calif. 1970) (On Motion to Dismiss). It is quite another to say that they bear no reasonable relationship to office, sales, technical or professional jobs. To the contrary, some such general aptitudes would seem to be most desirable in many of these positions, especially where, as here, the job calls for a variety of talents. At the least, high scores in such tests would indicate that the applicant would do well in this type job." (Emphasis added)

In *Colbert*, the District Court held that the general intelligence tests in question were professionally developed within the meaning of the statute and "... *if required by law*, are reasonably related to performance in the jobs sought to be filled by plaintiff."

The Circuit Court cases<sup>40</sup> cited by Petitioners in this connection hold only that where a *seniority system*, which

<sup>40</sup>*United States v. Local 189*, 416 F. 2d 980 (5th Cir. 1969), cert. denied 397 U. S. 919 (1970); *United States v. Hayes International Corp.*, 415 F. 2d 1038 (5th Cir. 1969); *United States v. Sheet Metal Workers, Local 36*, 416 F. 2d 123 (8th Cir. 1969).

originated before the effective date of the Act, has the effect of perpetuating discrimination, relief may be granted under the Act to remedy present and continuing effects of past discrimination. The Court below expressly approved the decisions of the Fifth and Eighth Circuits (A. p. 212a) and held that in this case the District Court should order that the seniority rights of the six Negro employees granted relief should be considered on a plantwide rather than a departmental basis to remedy the present effects of past discrimination. (A. p. 225a) None of the Circuit Court cases cited by Petitioners involve tests or educational requirements.

In *U. S. v. Local 189*, 416 F. 2d 980 (5th Cir. 1969) *cert den.*, 397 U. S. 919 (1970), the evidence *showed* that the employer's job seniority system did not provide the only safe or efficient system for governing promotions and the Court therefore held that "(T)he record supports the district court's holding that job seniority is not essential to the safe, and efficient operation of Crown's Mill." Petitioners argue that *Local 189* "plainly" overrules *Porter* (Pet. brief, p. 26, footnote 23). Their argument is totally erroneous because Judge Wisdom, speaking for the Court at page 993 said:

"In other words, the record in that case, as the district court viewed it, showed that safety and efficiency, the component factors of business necessity, would not allow relaxation of the job seniority system. We see no necessary conflict between *Porter's* holding on this point and our holding in the present case."

Petitioners and the Solicitor General try to draw this case into the ambit of civil rights cases heretofore decided by *this* Court. The cases relied on involve the constitutionality of state statutes, not employment practices, and are clearly distinguishable.

In *Guinn v. United States*, 238 U. S. 347, 59 L. Ed. 1340 (1915), the Court decided that a state statute was unconstitutional because it deprived citizens of the right to vote secured by the Fifteenth Amendment. Moreover, the petition for certiorari was drawn by the Court below, seeking instructions. *Lane v. Wilson*, 307 U. S. 268, 83 L. Ed. 1281 (1939), also held a state statute unconstitutional because it deprived Negroes of the right to vote. *Gaston County, North Carolina v. United States*, 395 U. S. 285 (1969), was a case brought under the Voting Rights Act of 1965; and *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E. D. La. 1967), *aff'd per curiam* 389 U. S. 471 (1968), held unconstitutional a state statute which set up a program of tuition grants to pupils attending private schools because it was *designed* to maintain segregated schools.

Title VII of the Civil Rights Act deals with *employment practices of private employers*. None of the cases (decided by this Court) cited by Petitioners in this context are even remotely connected with employment practices. In cases involving voting, schooling, or jury service it can be presumed or assumed that a significant number of the group involved have the necessary qualifications. It cannot be assumed *without evidence* that a significant number of Negroes in the class involved at Dan River have the qualifications to perform jobs in the higher skilled classifications. At least two District Courts agree in principle.<sup>41</sup>

Petitioners cite and rely on interpretations and utterances of the Office of Federal Contracts Compliance (OFCC). This is a Title VII action and must be tried within the framework thereof. An OFCC interpretation of the validity of tests and educational requirements under

<sup>41</sup>U. S. v. H. K. Porter, *supra*, at 70 LRRM 2131, 2148; and *Dobbins v. Local 212, IBEW*, *supra*, at 69 LRRM 2313, 2337, 2338.

the President's Executive Order is not binding on this Court.<sup>42</sup> This is especially true in view of Senator Humphrey's comment that Title VII is of "much less stringent language and much less in coverage than what was provided by the executive order."<sup>43</sup>

Petitioners argue that the Court should defer to the expertise of the EEOC and adopt that agency's interpretation that tests must be job-related in order to be valid. In support thereof, they cite several cases decided by this Court. (Pet. Brief p. 29, footnote 27) As noted by the Court below (A. p. 220a), none of those cases hold that the EEOC interpretation is binding on the Courts.

Petitioners and the Solicitor General are unable to cite a single case or convincing legislative history which supports their contention that Section 703(h) *requires* that tests used by private employers be job-related. In addition, they are unable to point to any legally established facts from which the Court could draw an inference that the tests are designed, used, or intended to discriminate against the four Blacks involved in this case.

### *C. Findings of Courts Below.*

The District Court *found* that in adopting the educational-testing requirements the Respondent had legitimate business reasons and did not intend to discriminate against its Negro employees. (A. p. 36a) The Circuit Court agreed. (A. pp. 216a-218a) Rule 52(a) of the *Federal Rules of Civil Procedure* provides that the trial court's findings of fact should not be set aside unless they are "clearly erroneous." This Court has held that even though

<sup>42</sup>*U. S. v. H. K. Porter Co.*, *supra*, at 2139, 2140.

<sup>43</sup>110 Cong. Rec. 13088, June 9, 1964.



the Appellate Court would construe the facts differently, the trial court's findings cannot be set aside unless they are "clearly erroneous." *United States v. Yellow Cab Co.*, 338 U. S. 338, 341-342, 94 L. Ed. 150 (1949).

Findings of fact supported by substantial evidence and affirmed by a Circuit Court of Appeals should be accepted without reexamination of the evidence.

This Court stated the principle in *Alabama Power Co. v. Ickes*, 302 U. S. 464, 82 L. Ed. 374 (1938), where Mr. Justice Sutherland stated at page 477 (377):

"These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

The Court repeated this in *Allen v. Trust Company of Georgia*, 326 U. S. 630, 90 L. Ed. 367 (1946), at page 636 (370), where it said:

"Those findings, being concurrent findings of the two lower courts, will be accepted here without re-examination of the evidence."

More weight than usual should be accorded the opportunity of the trial court to judge the credibility of Respondent's witness, A. C. Thies, the Company official who prescribed the educational-test requirement for interdepartmental transfer. Whether the Company intended to discriminate against Negro employees had to be determined primarily from the credibility and weight accorded Mr. Thies' testimony by the trial judge. Having had the opportunity to observe Mr. Thies' demeanor and conduct while on the stand, Judge Gordon found:

"More than ten years ago it ((Respondent) put into effect a high school education requirement *intended to eventually upgrade the quality of its entire work force*. At least since July 2, 1965, the requirement has been fairly and equally administered."

"The requirement was made applicable to a departmentalized work force *without any intention or design to discriminate against Negro employees*. The departments serve as a *reasonable* system of classification with each department having a *different* function and *each department requiring different skills*. (A. p. 34a, Emphasis added)

When the questions before this Court are concerned with determining the intent of the employer, particular weight should be accorded the trial court's findings. *United States v. Yellow Cab Co.*, *supra*. The Petitioners ask that this Court give them a trial *de novo* on the record and attribute to the Respondent a base motive and sinister intent to discriminate against its Negro employees. To do so would require this Court to attribute a devious purpose to discriminate behind the Respondent's efforts to upgrade the quality of the work force to keep pace with the growing technology in the electric utility industry.

In *United States v. National Association of Real Estate Boards*, 339 U. S. 485, 495-496, 94 L. Ed. 1007 (1950), Mr. Justice Douglas viewed the subject thusly:

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. . . . We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous'."

This is a case wherein Petitioners want this Court to set aside the trial court's findings as being "clearly erroneous", but they are unable to point out any evidentiary basis which would warrant it. The trial court's findings of fact and approval thereof by the court below are well supported, indeed compelled, by the competent, material, and substantial evidence of record.

### CONCLUSION

If the Company had merely gone along requiring a high school education, it is improbable that this action would have been instituted. Although the Tuition Refund Program was in effect and available to Petitioners for the purpose of acquiring a high school diploma, Respondent went one step further and agreed to accept minimum test scores as a substitute or in lieu of a high school education. Thereupon, Petitioners seized upon Section 703(h) which provides that it is not an unlawful employment practice to give and act upon the results of any "professionally developed ability test" and brought this action claiming tests being used by the Company failed to meet the criteria of that Section. The Company took this action to allow Negroes and whites without a high school diploma to lift themselves up by their own bootstraps. It backfired. As a result, the Company finds itself embroiled in an expensive and time-consuming suit which has now reached the highest court in this nation.

Respondent has done its best to comply with the provisions of Title VII. The Petitioners choose to ignore the legitimate purpose of the high school requirement which the evidence of record shows to be a good faith, prudent business judgment not motivated by bad faith or

discrimination in any form. They seek instead to turn back the clock and thereby gain preferential treatment in promotions and interdepartmental transfers without regard to the qualifications the Company has determined necessary to perform the higher skilled jobs. The test requirement is a fair and reasonable substitute for the high school education requirement and is the minimum assurance with which the Company can safely and efficiently operate its Dan River plant for the production of electric energy.

The decision of the majority below is amply supported by the record, the legislative history of the Act and the applicable decisional law. With respect to the four black employees involved here, the Petitioners have failed to shoulder the burden of proving that the Company is intentionally engaged in unlawful employment practices proscribed by the Act and the Respondent, Duke Power Company, respectfully submits that the decision of the Court below should, therefore, be affirmed.

*Respectfully submitted,*

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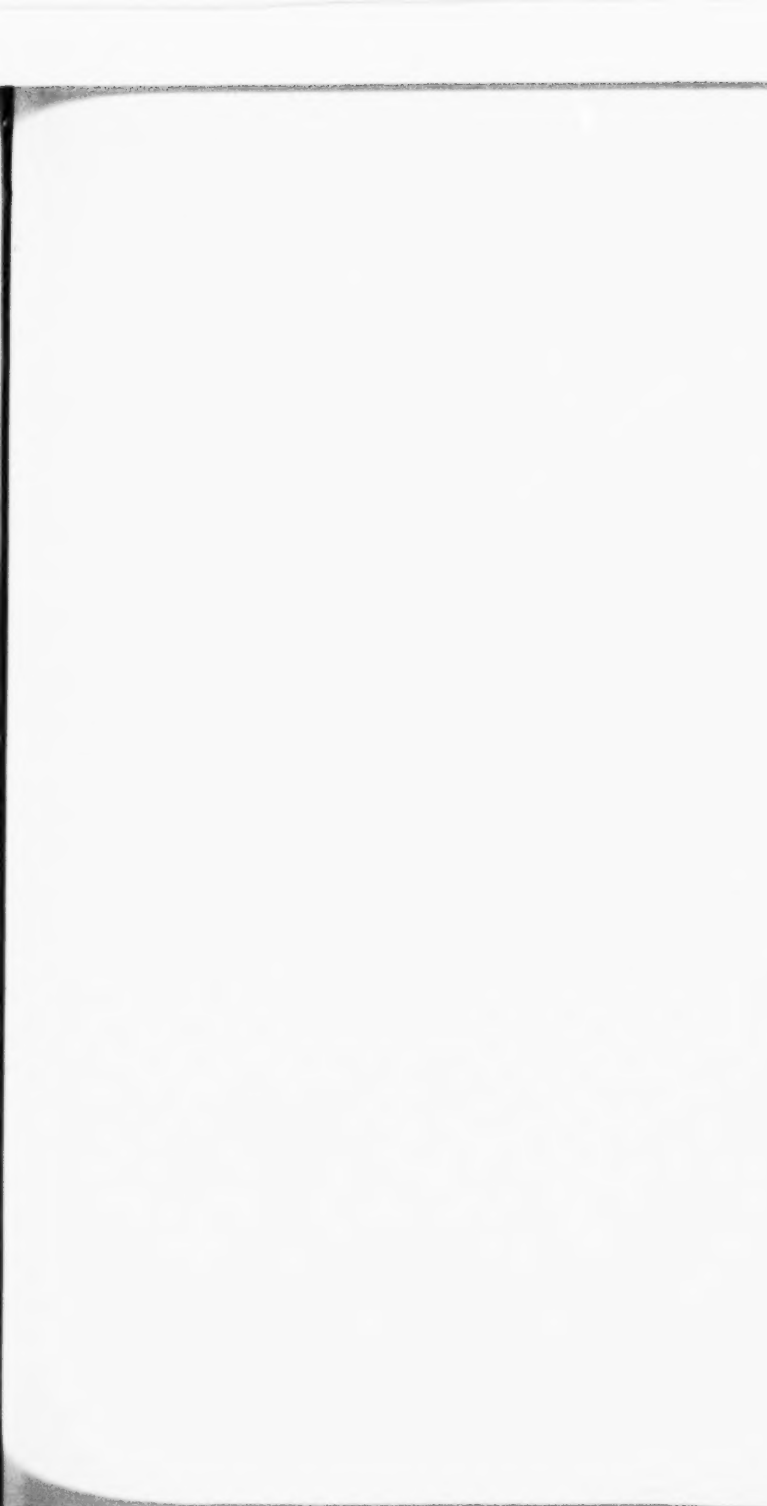
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On Writ of Certiorari to the United States Circuit Court of Appeals  
for the Fourth Circuit

**BRIEF AMICUS CURIAE ON BEHALF OF  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

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No. 124

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WILLIE S. GRIGGS, ET AL., *Petitioners,*

v.

DUKE POWER COMPANY, a Corporation, *Respondent.*

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On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit

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**BRIEF AMICUS CURIAE ON BEHALF OF THE  
CHAMBER OF COMMERCE OF THE  
UNITED STATES OF AMERICA**

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**INTEREST OF THE AMICUS CURIAE\***

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000.

The subject matter of the instant case—the utilization of educational or test requirements to select employees for hiring or promotion—is a matter of significant national concern. Virtually all employers, in all parts of the country, utilize a “test” as the Equal Employment Opportunity Commission has broadly de-

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\* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

fined that term, "any paper-and-pencil or performance measure used as a basis for any employment decision."<sup>1</sup> For example, 55% of all companies in the United States employing more than 1600 employees use the Wonderlic Personnel Test here involved and the Bennett Mechanical Aptitude Test, also at issue in the present case, is used by over 20% of these companies,<sup>2</sup>

The interest of the National Chamber, therefore, in filing this brief *amicus curiae* urging affirmance of the decision below, is predicated on the substantial and far-reaching consequences that the result in this case will have for American industry.

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<sup>1</sup> EEOC's *Guidelines on Employee Selection Procedures*, effective August 1, 1970, 29 C.F.R. 1607 (hereinafter referred to as the "Guidelines"), at Section 1607.2 thereof, further defines a "test" as follows:

"... This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term 'test' includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc."

Moreover, the Guidelines also cover, in Section 1607.13, "[s]election techniques other than tests . . . includ[ing], but . . . not restricted to, unscored or casual interviews and unscored application forms."

<sup>2</sup> Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 712 (1968). It is perhaps not surprising, therefore, that an estimated one-fifth of all charges filed under Title VII involve the issue now before this Court. Report of the Committee on Equal Employment Opportunity Law, II 1970 Proceedings of the Section of Labor Relations Law of the American Bar Association, 75.

## A R G U M E N T

## I.

## INTRODUCTION

Prerequisite to achievement of the goal of Title VII, the elimination of discrimination in employment relations, is the restriction of subjective factors as criteria for employee selection. As one observer commented, "The more control over hiring and promotion policies is taken away from management and is placed in objective events outside its control the nearer we will be to eliminating discrimination. This quest for objectivity is seen in the recent wholesale adoption of standardized employment tests by American industry."<sup>3</sup> Indeed, tests and educational requirements constitute the *only* objective means available to employers to perform the necessary task of selecting among applicants or employees on the basis of individual merit when previous job experience is not relevant or available in quantified form.<sup>4</sup>

Employment tests and educational requirements could, of course, become vehicles for discrimination. While such an invidious device is no less to be con-

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<sup>3</sup> Affeldt, *Title VII in the Federal Courts—Private or Public Law—Part II*, 15 Vill. L. Rev. 1, 17 (1969). Similarly, the Justice Department has recognized the desirability of objective selection devices by insisting that remedial orders to correct discriminatory hiring practices contain "objective and reviewable standards." Speech of Assistant Attorney General Leonard to the American Bar Association Section of Labor Law, August 10, 1970, reprinted at 157 Daily Labor Report E-1, E-3 (BNA, August 13, 1970).

<sup>4</sup> The necessity that an employer select one of many potentially eligible individuals is a critical distinction between the instant case and the education and voting rights cases (e.g., *Gwinn v. United States*, 238 U.S. 347, and the other decisions cited at footnote 9 of the Government's brief herein) where it is both feasible and desirable that the relevant population include *everyone* with minimum eligibility.

demned than any overtly discriminatory practice, there is no reason to believe that such requirements are so used, or would ever be so used, by a significant number of employers. Advocates of Petitioners' position, including co-counsel for Petitioners, have recognized that "there is frequently no discriminatory intent underlying the adoption of . . . testing practices"<sup>5</sup> and that "there are many easier ways to discriminate if the employer is so inclined."<sup>6</sup> The answer, thus, is not to condemn the use of educational or test requirements by all employers in all cases but, rather, to ascertain in which particular instances the employer does not, in fact, use such devices for a *bona fide* business purpose. As in so many other areas of civil rights and industrial relations, an accommodation must be reached between all of the legitimate interests involved "with as little destruction of one as is consistent with the maintenance of the other."<sup>7</sup>

Initially, there appears to be little dispute as to the case-by-case approach that is necessary to strike such a balance. First, there must be a determination of the racial impact of the practice involved. As co-counsel for Petitioners acknowledges, this step is essential "to assure that a practice is not found discriminatory merely because it disadvantages an in-

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<sup>5</sup> Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach To Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1670 (1969).

<sup>6</sup> Barrett, *Gray Areas in Black and White Testing*, Harv. Bus. Rev., Jan.-Feb. 1968, at 92, 94.

<sup>7</sup> *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112. See also *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 323; *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34; *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375.

dividual black in some isolated situation. A practice should be found discriminatory only where it *consistently* and *systematically* prefers whites over blacks." Cooper and Sobol, *supra* n. 5, at 1671 (Emphasis added). Petitioners similarly concede that before a test or educational requirement can be deemed unlawful it must operate as "a serious barrier" to minority employment; if there is no such barrier, the case "need be subjected to little, if any, examination under fair employment laws." Brief for Petitioners at note 18 and p. 30, citing *Parham v. Southwestern Bell Telephone Co.*, — F. Supp. —, 60 CCH L.C. ¶19297 (E.D. Ark., 1969), *appeal noticed*, 8th Cir., No. 19969.

The second step, assuming that a "serious barrier" does, in fact, exist, is to determine those cases in which a discriminatory intent can reasonably be inferred. There is no dispute, for example, that such an intent may exist, where, as stated by the Government in its *amicus* brief (p. 19), there is an absence of "legitimate business needs" which justified the employer's utilization of such educational or test requirements. But what constitutes a "legitimate business need"? Petitioners argue that, if the business justification is not readily apparent, as where tests are used to measure skills which are an integral component of the job involved,<sup>8</sup> the employer must prove the requirements utilized were validated in conformity

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<sup>8</sup> See, e.g., the typing and dictation required of clerical employees in *Colbert v. H.-K. Corp., Inc.*, — F. Supp. —, 63 CCH L.C. ¶ 9514 (N.D. Ga. 1970), *appeal noticed*, August 3, 1970, and the arithmetic and change-making tests utilized for grocery clerks in EEOC Decision No. 70-501, Case No. YAT9-633, reprinted in CCH FEP Guide, ¶ 6112 (1970).

with the EEOC's Guidelines.<sup>9</sup> If there has no such validation, then, in their view, there has not been a sufficient showing of overriding business necessity. It is at this point that the National Chamber, for the reasons set forth below, submits that Petitioners' case must fall.

## II.

### **THERE HAS BEEN A SUFFICIENT SHOWING OF BUSINESS JUSTIFICATION HERE TO SANCTION DUKE POWER'S TEST AND HIGH SCHOOL EDUCATION REQUIREMENTS**

#### **A. The Guidelines Are Entitled to Little Deference**

As the court below found, while the Guidelines are entitled to appropriate respect, they are not conclusive on the courts. 420 F.2d at 1234 citing *International Chemical Workers Union v. Planters Manufacturing Company*, 259 F. Supp. 365 (N.D. Miss., 1966). In contrast to "legislative" rules or regulations which have the force and effect of law, the Guidelines are "interpretative" opinions constituting the EEOC's construction of Title VII and having "validity in judicial proceedings only to the extent that they correctly construe the statute." See, e.g., 1 Am. Jur. 2d *Administrative Law*, § 95 (1962). The principal salutary effect of the Guidelines is to inform

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<sup>9</sup> The "job-related" concept is but one aspect of the validation process. Thus a test which is job-related may still not have been validated as required by the Guidelines, and presumably, under the Petitioners' view, could not then be utilized. Accordingly, the critical inquiry to which this brief will be addressed is the extent to which the absence of validation, rather than job-relatedness, is sufficient to infer a discriminatory intent.



"the public of the Commission's interpretation of the statute" (*American Newspaper Publishers Assn. v. Alexander*, 294 F. Supp. 1100, 1103 (D.D.C., 1968), *motion for summary reversal denied*, — F.2d —, 59 CCH L.C. ¶ 9203 (D.C. Cir., 1969)) and the Guidelines' persuasiveness, in turn, is dependent "upon the thoroughness evident in [the EEOC's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140.<sup>10</sup>

Moreover, in considering the deference to be accorded the Guidelines, it should be recognized that the EEOC has consciously sought to construe Title VII "as broadly as possible in order to maximize the effect of the statute on employment discrimination without going back to Congress for more substantive legislation".<sup>11</sup> In doing so, the Commission "de-

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<sup>10</sup> See *Dewey v. Reynolds Metal Company*, — F. 2d —, 63 CCH L.C. ¶ 9455 (6th Cir., 1970), where the court, in noting that it is the statutory proscriptions which serve to limit and define the sphere of legitimate administrative action, stated at footnote 1:

"It should be observed that it is regulation 1605.1(b) and not the statute (§ 2000 e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is *only* discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted." (Emphasis the court's).

<sup>11</sup> Alfred Blumrosen, a participant in many EEOC policy determinations between 1965 and 1967, in *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 Geo. Wash. L. Rev. 695, 702-3 (1970).

part[ed] . . . from previous notions of what discrimination is”<sup>12</sup> and, in taking “its interpretation of Title VII a step further than other agencies have taken their statute”, disregarded “intent . . . as crucial to the finding of an unlawful employment practice.”<sup>13</sup> In the process of this “creative interpretation” of the law, the legislative history of the Act was regarded as only an outer limit, not a guide, apparently based

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<sup>12</sup> Richard Berg, Deputy General Counsel of the EEOC from 1965 to 1967 and the Justice Department attorney who assisted the Senate leadership during its consideration of Title VII, in his review of Berger: *Equality by Statute* and Winter, *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern*, 17 Amer. Univ. L. Rev. 379, 387-388 (1968).

The importance of this departure from the established definition of the term “discrimination” is underscored by the following statement inserted in the Congressional Record during the debates on Title VII by Senator Clark:

“Objection: The language of the statute is vague and unclear. It may interfere with the employers’ right to select on the basis of qualifications.

Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin) any other criteria or qualification, is untouched by this bill.”

110 Cong. Rec. 6997.

<sup>13</sup> Samuel Jackson, a Commission member from 1965 to 1968, in remarks to a meeting of the National Association for the Advancement of Colored People Region 1 on September 23, 1967, reprinted at CCH FEP Guide, ¶ 8179 at 6312.

on the premise that the courts "were available to prevent serious error" and might sustain the EEOC's interpretation of Title VII "partly out of deference to the administrators."<sup>14</sup>

In these circumstances, the Guidelines do not represent an objective interpretation of Title VII. Rather, they contain such a pervasive and definitive set of standards<sup>15</sup> that they are tantamount to an assumption of the substantive rule-making power which Congress specifically denied to the EEOC.<sup>16</sup> There is surely serious reason to question their practicality and feasibility. While test validation is a desirable objective, it is often an elusive one because of the prohibitive expense and difficulties involved, particularly in view of the infant state of the art of industrial psychology,

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<sup>14</sup> Blumrosen, *supra*, n. 11 at 703.

<sup>15</sup> To give a few examples: The Guidelines would even require that, wherever "technically feasible", each separate "test" utilized be validated for each racial component of the work-force, for each separate unit of a multi-unit organization, and in such a manner so that the results can be presented with the necessary inclusions of "graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior". Guidelines, Sections 1607.4-1607.6. In addition, "alternative, suitable hiring, transfer or promotion procedures" to the *particular* "test" used must be shown to be "unavailable" and the *particular* "test" used must evidence "a high degree of utility" as defined by the Guidelines. Section 1607.3. And the subject matter of the test, notwithstanding a legitimate employer desire to promote *many* employees from within, must be restricted only to those jobs which employees "will probably within a reasonable period of time and in a *great majority* of cases, progress to . . ." Guidelines, Section 1607.4(c)(1) (Emphasis added).

<sup>16</sup> Section 713(a) of Title VII, 42 U.S.C. 2000e-12(a). The word "procedural" in Section 713(a) was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations. 110 Cong. Rec. 2575 (1964).

in securing an adequate and representative sample.<sup>17</sup> Given these limitations, it is unreasonable to require employers to cease using tests which have been professionally developed and selected by a testing specialist who has considered the specific job and manpower needs of that employer. However, Petitioners seek to force Duke Power to cease using precisely such tests and the Guidelines would require the same result of all similarly-situated employers. To paraphrase *Skidmore*, the Guidelines demonstrate little thoroughness in the Commission's consideration, little validity in its reasoning, a lack of consistency (as discussed *infra*) with the EEOC's earlier pronouncements and a corresponding lack of persuasiveness.

**B. Duke Power's High School Education Requirement  
Constitutes a Valid Means of Employee Selection**

Congress, when it enacted Title VII, was well aware that the historic educational disadvantages of Negroes and other minorities constituted an impediment to equal employment opportunity.<sup>18</sup> It was also widely recog-

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<sup>17</sup> See, e.g., the testimony of Petitioners' expert witness at Appendix, pp. 133a-137a, and the testimony of Respondent's expert witness at Appendix, pp. 178a-181a. See also Barrett, *supra* n. 6, at 94: "... tests for probably less than one job out of twenty can be adequately validated, because there are few job categories with enough whites and Negroes to make research for better tests possible."

<sup>18</sup> For example, in his Civil Rights Message of June 19, 1963, U.S. Code Cong. and Admin. News, 88th Cong., 1st Sess., at 1526, 1531-4, President Kennedy noted that Negro workers and job seekers suffered from a scarcity of jobs and educational disadvantage as well as from employer and union prejudice. Secretary of Labor Wirtz similarly stated in 1963 that

"Disproportionate unemployment among nonwhites is unquestionably related to the fact that about one-third of the 3 million adults in this country who cannot read or write are non whites; also to the fact that 25 percent (or 2.3 million)

nized that many employers required a high school education as a hiring or promotion prerequisite. This fact was specifically noted without criticism in a report by the House Education and Labor Committee on an earlier version of Title VII.<sup>19</sup> Also, a Senate Labor Subcommittee chaired by Senator Clark, the co-manager of Title VII during its consideration in the Senate, received without comment a full description of employer and union preference for high school graduates.<sup>20</sup> And the House Judiciary Subcommittee which reported the Civil Rights Act of 1964 heard Secretary of Labor Wirtz testify that those who dropped out of school at 16 "never had the real ad-

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of the nonwhites 25 years of age or older did not complete 5 years of schooling (compared with 7 percent of the adult white population); and to the fact that almost half of the adult nonwhites in the country today did not finish grade school (compared with about 20 percent of the whites)".

Hearings on Civil Rights, 88th Cong. 1st Sess., House Committee on Judiciary, Subcommittee No. 5, Hearing Vol. 2 at p. 1491, (1963).

<sup>19</sup> H. Rep. 1370 on H. R. 10144, 87th Cong. 2d Sess. at p. 2. H. R. 10144 was essentially identical to Title VII as reported by the House Judiciary Committee. See Additional Views of Hon. George Meader, H. Rep. No. 94 on H. R. 7152, 88th Cong. 1st Sess. at p. 57 (1963).

<sup>20</sup> "... in every occupation for which data are shown high school graduates earn more than men who quit school after the eighth grade . . . .

Why the difference? There are many reasons. High School graduates have higher IQ's. This is partly due to their greater education. It may also reflect greater native intelligence and aptitude to learn. But there are other reasons.

Employers give preference to high school graduates. With a diploma a man can drive a bus for a transcontinental bus line; without it he is lucky to get a job with Podunk Transit Co. which pays much lower wages . . . . Unions also prefer high school graduates."

Testimony of Special Assistant to the Director of the Bureau of the Census, Senate Hearings on Equal Employment Opportunity, 88th Cong. 1st Sess. at pp. 324, 326 (1963).

vantages of the kind of education which would qualify them for anything except unskilled work.”<sup>21</sup> Indeed, the use of educational requirements and tests was frequently discussed during the formulation of Title VII in the House.<sup>22</sup>

Yet, notwithstanding this ample recognition that employer use of educational requirements was prevalent and in many cases had a disproportionately adverse effect on minorities, no attempt was made by Congress to require employers to justify the use of such qualifications. In fact, Senator Case, the other Senate co-manager of Title VII, gave explicit assurance that employer utilization of educational requirements would not be affected by Title VII.<sup>23</sup> The

<sup>21</sup> Hearing on Civil Rights, 88th Cong. 1st Sess. House Committee on Judiciary, Subcommittee No. 5, Hearing Vol. 2, p. 1460 (1963).

<sup>22</sup> See colloquy between Senator Williams and Congressman Martin, Hearing on Equal Employment Opportunity, 88th Cong. 1st Sess., House of Representatives, General Subcommittee on Labor of the Committee on Education and Labor at pp. 17-19 (1963); testimony of Secretary of Labor Wirtz, *id.* at p. 466; the remarks of Congressman Pucinski, *id.* at p. 24; the colloquy between Congressman Pucinski and Reverend Hildebrand, *id.* at pp. 37-38; and the discussions involving Samuel E. Harris, *id.* at pp. 228-231, Wesley Stearns and J. C. McCormack, *id.* at pp. 423-428 and Murray Preston and Donald Mowbray, *id.* at pp. 434-438. See also H.R. No. 570, 88th Cong., 1st Sess. at p. 5 (1963).

<sup>23</sup> “. . . it would be ridiculous, indeed, in addition to being contrary to Title VII, for a court to order an employer who wanted to hire electronics engineers with Ph.D's to lower his requirements because there were very few Negroes with such degrees or because prior cultural or educational deprivation of Negroes prevented them from qualifying.

. . . Title VII would in no way interfere with the right of an employer to fix job qualifications and any citation of the *Motorola* case to the contrary as precedent for Title VII is wholly wrong and misleading.”

110 Cong. Rec. 7026 (1964).

Congressional decision to permit the use of unvalidated educational attainment standards may have been the product of an understandable legislative reluctance to avoid the substantial disruptive effects that would flow from imposing such a prohibition. It may have been based on a compelling desire not to denigrate the paramount significance of educational achievement in the American way-of-life.<sup>24</sup> Whatever the reason, Congress neither prohibited the use of educational requirements nor declared that such standards must be validated to be lawful. Given this history, it is not surprising that the initial decision by the EEOC in this area—the “contemporaneous construction” of Title VII by those “charged with the responsibility of setting its machinery in motion” (*Udall v. Tallman*, 380 U.S. 1, 16)—held that educational qualifications uniformly imposed were not violative of the Act.<sup>25</sup>

The fact that Duke Power utilized an unvalidated high school education requirement should not, therefore, *in and of itself*, be deemed sufficient to impute to the Company the “intent” to discriminate required by Section 706(g) of Title VII. There must be, in addition, *independent* evidence which demonstrates that the Company’s use of educational requirements was a mere pretext or subterfuge and not the product of a *bona fide*, good faith business objective. For example, such an unlawful motivation might be evidenced

<sup>24</sup> Cf., e.g., the case, reported at Note, 68 Columbia L. Rev., *supra* n. 2, at p. 719, in which the Office of Federal Contract Compliance “permitted a southern company to retain its requirement of a high school diploma although the job in question clearly required less education. The reason was that the Company was attempting to force local teenagers, many of them Negroes, to complete high school by removing the temptation of jobs for drop-outs”.

<sup>25</sup> G.C. Opin. 296-65, October 2, 1965, reprinted in CCH FEP Guide ¶ 17,251.0262.

by the limited nature of the jobs for which the educational qualification is imposed as, for example, if it applied to menial jobs which have no promotion potential. Independent evidence in other instances might be predicated on the timing of the institution of the requirement or even the employer's "overlay" of poor performance in the area of race relations. Cf., e.g., *Colbert v. H-K Corp.*, *supra*. In the present case, however, as the court below carefully delineated, Duke Power's high school educational requirement was imposed *nine years* prior to the passage of the Act; it was not applied to laborer jobs; the requirement was approved by an expert as a reasonable means of selective employees with "the training, ability and judgment" required by the Company; the adoption of the requirement adversely affected both whites and Negroes; and the Company's good faith in race relations was manifested by its discontinuance of prior discriminatory practices and its willingness "to pay for the education of incumbent Negro employees who could thus become eligible for advancement." 420 F. 2d at 1232-1233.

**C. Duke Power's Testing Requirement Constitutes a Valid Means of Employee Selection**

Employer utilization of tests as a means of employee selection, notwithstanding that such tests may have a disparate adverse effect on culturally disadvantaged groups, was also a subject that was widely debated during the legislative hearings on Title VII. During Senate consideration of the House bill (H.R. 7152), attention was specifically focused on this subject by the decision of a hearing examiner for the Illinois Fair Employment Practices Commission in *Myart v. Motorola, Inc.*, reprinted in 110 Cong. Rec. 5476-5479 (1964), which held that the continued use of a general



aptitude test, professionally developed for Motorola but not differentially validated for disadvantaged and culturally deprived groups, constituted a form of racial discrimination.

The Senate sponsors of the Civil Rights Act repeatedly insisted that a *Motorola* decision could not result under Title VII for two reasons: first, because the power to interpret and enforce its provisions was placed in the courts and not in the Equal Employment Opportunity Commission,<sup>26</sup> and second, because "title VII would not permit even a Federal court to rule out the use of particular tests by employers because they do not 'equate inequalities and environmental factors among the disadvantaged and culturally deprived groups.'" <sup>27</sup> Senators Clark and Case, the co-managers of Title VII, thus declared that "... [a]n employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance."<sup>28</sup>

<sup>26</sup> As Senator Case stated: "Only a Federal court would have the authority to determine whether or not a practice is in violation of the act and only the court could enforce compliance". 110 Cong. Rec. 7026 (1964). See also *id.* at 6205 and 12641-2.

<sup>27</sup> *Id.* at 7026.

<sup>28</sup> *Id.* at 6997. In addition, Senator Clark placed the following objection and answer in the Record:

"Objection: The bill would make it unlawful for an employer to use qualification tests based upon verbal skills and other factors which may relate to the environmental conditioning of the applicant. In other words, all applicants must be treated as if they came from low income, deprived communities in order to equate environmental inequalities of the culturally deprived group.

Answer: The employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance."

Broad as these guarantees were, they did not satisfy Senator Tower who introduced an amendment to insure the right of an employer to use tests "designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . [or] whether such individual is suitable or trainable within such business or enterprise" as long as such tests were given "without regard to the individual's race, color, religion, sex or national origin."<sup>29</sup> Senator Case declared, however, that the amendment was "unnecessary . . . [and] would tend to complicate and make more difficult dealing with cases of actual discrimination . . . " and Senator Humphrey assured his colleagues that "[e]very concern of which this amendment seeks to take cognizance has already been taken care of in Title VII . . . . These tests are legal. They do not need to be legalized a second time". On the basis of these statements, the amendment was voted down.<sup>30</sup>

Two days later Senator Tower reintroduced his amendment, containing the language of the present Section 703(h), noting that there had been "agreement in principle" on his earlier amendment but that "the language was not drawn as carefully as it should have been."<sup>31</sup> The revision provided that the amendment's sanction of professionally developed ability tests would not extend to tests "designed, intended or used" to discriminate on racial or other bases prohibited by Title VII. Senator Humphrey accepted the revised amendment as "in accord with the intent and pur-

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<sup>29</sup> *Id.* at 10879.

<sup>30</sup> *Id.* at 13030-13031, 13054.

<sup>31</sup> *Id.* at 13246.

pose" of Title VII stating that, "[t]he Senator has won his point."<sup>32</sup>

The Petitioners now contend that all that Senator Tower won, and all that Title VII intended, was to permit employers to utilize professionally developed tests if *they have been properly validated in accordance with the EEOC's Guidelines*. This would indeed have been a hollow victory. It was the very finding of a violation in *Motorola*, premised on the absence of differential validation, that triggered the Senate debates. Indeed, it was the express purpose of Senator Tower's amendment to prevent

"... an Equal Employment Opportunity Commission ruling that would in effect unvalidate tests of various kinds of employees by both private business and Government to determine the professional competence or ability or trainability or suitability of a person to do a job."<sup>33</sup>

It is also significant that contemporary observers of the legislative process that produced Title VII did not suggest that tests could only be used if they had been validated. Thus Assistant Attorney General Norbert Schlei stated in a briefing for the Bar Association of the City of New York in early 1965:

"The entire question under this statute is whether the test is being used as an instrument of discrimination or not. *If it is being used in an honest attempt to find the best people, it is not a violation of the statute.*" (Emphasis added).<sup>34</sup>

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.* at 13019.

<sup>34</sup> *The Implications for Business of the Civil Rights Act of 1964* (Panel of Benetar, Knight, Schlei, Fowler), 20 Record of the Assn. of the Bar of N. Y. 128 at 139 (1965).

Richard Berg similarly commented that Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications. . . . The issue in any case where the use of an ability test is questioned is not whether the test is professionally developed, or whether it is a good test or a bad test, but whether it is used in good faith or with intent to discriminate."<sup>35</sup> Professor Severn also conceded that Title VII permits employers to use tests which "require a high degree of literacy when the job being tested for does not" as long as the tests are not being used for the purpose of racial discrimination.<sup>36</sup> The EEOC, in one of its initial opinions construing Title VII, held that employers may use professionally developed tests, without proof of validation, where there is no evidence of intent to discriminate on the basis of race.<sup>37</sup> And, as the court below noted, "[a]n amendment [to Title VII] requiring a 'direct relation' between the test and a 'particular position' was proposed in May, 1968, but was defeated." 420 F. 2d at 1235 citing Senate Report No. 1111, May 8, 1968.

In sum, as in the case of educational requirements, Congress was well aware in 1964 that tests were widely used by many employers as a basis for employee selection and that such tests often had an adverse impact on disadvantaged and culturally deprived

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<sup>35</sup> Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brook. L. Rev. 62, 74-5 (1964).

<sup>36</sup> Severn, *Legal Restraints on Racial Discrimination in Employment*, 73 (Twentieth Century Fund, 1966).

<sup>37</sup> G.C. Opin., 461-65, Opin. Ltr. December 16, 1965, reprinted in CCH FEP Guide, ¶ 17,252.25.

groups. The balance that Congress struck, however, neither precluded the future utilization of such tests nor required validation as a prerequisite to continued employer use. Indeed, Congress specifically sanctioned the use of tests *as they had been instituted and applied by Motorola*, i.e., tests which had been professionally-developed and used for legitimate business purposes in an atmosphere free from any *independent* evidence of a discriminatory intent.

Such independent evidence of discrimination might relate to the menial nature of the jobs for which the test requirement is imposed, to the timing of its adoption of the test requirement or to the employer's general performance in the area of race relations. It might also consist of utilizing a test that has not been developed by trained psychologists or which, in the view of qualified experts, would not reasonably suffice for the purposes intended. Even the failure to undertake a comparison of the results of such tests with actual employee performance might be sufficient to infer a discriminatory intent. Where, however, as here, no such evidence has been adduced, and presumably none exists which demonstrates a discriminatory motive, there should be no finding of a violation of Title VII. As the court below concluded, in addition to the evidence of the Company's good faith described at page 14, *supra*, the tests used by Duke Power were, according to the testimony of an expert witness, "professionally developed and . . . reliable and valid" and the reason for adopting the testing requirement, therefore, was "one of business necessity" rather than discrimination. 420 F.2d at 1233-4. Moreover, Duke Power is presently in the process of validating the tests here involved, a procedure which

necessarily requires "a fairly good sized group" and a considerable period of time. Appendix, pp. 179a-181a.

### CONCLUSION

For the foregoing reasons the decision of the court below should be affirmed.

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IN THE  
**Supreme Court of the United States**

October Term, 1970

No. 124

**WILLIE S. GRIGGS, et al.,** *Petitioners,*

**v.**

**DUKE POWER COMPANY, a Corporation,** *Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**MOTION OF UNITED STEELWORKERS OF  
AMERICA, AFL-CIO  
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

*and*

**BRIEF FOR UNITED STEELWORKERS OF  
AMERICA, AFL-CIO, AMICUS CURIAE**

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October Term, 1970

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**DUKE POWER COMPANY, a Corporation,** *Respondent.*

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**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE**

United Steelworkers of America, AFL-CIO (hereinafter "USWA"), moves for leave to file the attached brief *amicus curiae* in support of the petitioners. The consent of petitioners was obtained, but consent was refused by respondent.

USWA is a labor organization representing approximately 1,250,000 employees in the steel, aluminum, nonferrous and metal fabricating industries. While USWA does not maintain statistics on the race or nationality of its members, it is believed that approximately a quarter of a million of USWA's members are Negroes, and that a substantial segment of USWA's membership consists of members of other minority groups. One of USWA's Constitutional objectives is "to protect and extend . . . civil rights and liberties". In pursuit of that objective, USWA actively campaigned for passage of the Civil Rights Act of 1964, especially Title VII's prohibition of employment discrimination.

The issue presented in the instant case is whether an employer violates Title VII by utilizing non-job-related tests and standards as criteria for determining employees' eligibil-

ity to advance or transfer within the plant. The court below held that such tests and standards are not violative of Title VII, absent evidence of an actual intent to discriminate. USWA believes that this holding is dangerously wrong and should be reversed by this Court.

USWA has been fighting for decades to eliminate through collective bargaining the use of non-job-related tests and standards as criteria for job advancement, because such devices are irrelevant to the employer's need for determining competence to perform the particular jobs sought by his employees, are unfairly weighted against those who have received inadequate or inferior educations, and are culturally biased.

USWA's quest at the bargaining table has met with mixed success. The current agreements between USWA and most of the major steel producers provide that all tests "shall be free of cultural, racial or ethnic bias".<sup>1</sup> They further provide that (with two exceptions discussed below) :

"[W]here tests are used by the Company as an aid in making determinations of the qualifications of an employee, such a test . . . must in any event be a job-related test. A job-related test, either written or in the form of an actual work demonstration, is one which measures whether an employee can satisfactorily meet the specific requirements of that job including the ability to absorb any training which may necessarily be provided for that job."<sup>2</sup>

The two exceptions relate to entrance into the apprenticeship programs (which train employees for certain particular types of trade and craft jobs which exist in the steel indus-

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<sup>1</sup> Agreement between United States Steel Corporation and the United Steelworkers of America, dated August 1, 1968, Appendix F, Paragraph 5(b). Identical language appears in USWA's agreements with most of the other major steel producers.

<sup>2</sup> *Id.*, Appendix F, Paragraph 1.

try) and the filling of these trade and craft vacancies.<sup>3</sup> USWA has been unable in collective bargaining to win express assurance that in filling such apprenticeship and trade and craft vacancies the employers will utilize only tests which are job-related.

USWA's goal is to eradicate, either in collective bargaining or through litigation, non-job-related testing and standards wherever they continue to be utilized by employers whose employees it represents (apprenticeship and trade and craft vacancies in the basic steel plants, and the broader use of such tests and standards by many smaller producers who have not agreed to the basic steel provision quoted above). The decision below, holding that the utilization of non-job-related tests and standards does not violate Title VII, is a major threat to the fulfillment of USWA's goal. Accordingly, USWA is vitally interested in the outcome of this litigation, and begs leave to file the attached brief *amicus curiae*.

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<sup>3</sup> *Id.*, Appendix F, Paragraphs 3 and 4.

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**BRIEF FOR UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, AMICUS CURIAE**

This case poses an issue which, perhaps more than any other, will determine whether Title VII can succeed in according minority employees equal opportunities in employment.

Title VII expressly prohibits hiring and job assignment based, *inter alia*, on race or national origin, and we know of no employer who today openly conditions access to jobs on such bases. Nevertheless, the same results can be achieved—whether or not so intended—by the utilization of factors “neutral on their face” which are unfairly slanted against minority groups. It is a sad but inescapable fact that Negroes, Mexican-Americans, Puerto Ricans and other minority groups *as a class* have suffered educations inferior to those of whites *as a class*. This deficiency is reflected not only in the number of grades completed, but also in the fact that the *quality* of education afforded to minorities so often is inferior to that afforded to whites.<sup>1</sup>

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<sup>1</sup> For a contemporary demonstration of the inequality between predominantly white and predominantly black schools in a large city, see Judge Wright’s exhaustive analysis of the District of Columbia school system in *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

Title VII cannot completely eradicate the employment disadvantage suffered by employees who have received inadequate educations. Educational deficiencies of minority employees necessarily preclude their advancing to jobs which *require* educational skills they do not possess. An employer does not violate Title VII by denying advancement to an employee who lacks the ability to perform the job to which he aspires. The solution to this problem lies elsewhere; it will not be found in Title VII.<sup>2</sup>

But Title VII can, and should, be implemented to eradicate employment disadvantage which results from an employer's use of standards for advancement which are *greater* than those required to perform the jobs involved. In these circumstances, employees who are in fact qualified will, nevertheless, be barred. Since minority workers as a class are less likely to meet excessive or irrelevant requirements, on account of educational deficiencies, the effect is plainly discriminatory.<sup>3</sup>

The unfairness of utilizing excessive or irrelevant standards for job advancement is dramatically illustrated by the facts of the instant case. Historically, the employer assigned Negroes only to its "Labor" department. In 1966, apparently in response to passage of Title VII, the employer provided that these employees could now transfer to the higher paying, more attractive departments previously reserved for whites. In order to transfer, however, the employees would

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<sup>2</sup> In the steel industry, the problem is being attacked through an experimental program of in-plant education, designed to advance employees from illiteracy through high school equivalency, thereby enabling them to qualify for higher paying jobs. The program is jointly sponsored by the federal government, USWA and the major steel companies.

<sup>3</sup> Non-job-related testing is one form of excessive standard—probably the most common one—but it is by no means the only device which works this injustice. For example, an employer who does not test at all, but who requires a high school diploma for advancement to jobs which in fact do not require that degree of educational attainment, equally discriminates.

have to achieve "passing" scores on two "quickie" tests—the Wonderlic Personnel Test and the Bennett Mechanical AA test.<sup>4</sup> These tests are in the record, and warrant the Court's attention. Taking the Wonderlic test as an example, it is doubtful that even one of its fifty questions is relevant to some of the jobs to which Negroes might seek to transfer in respondent's plant. For example:

\* \* \*

4. Answer by printing YES or NO. Does B. C. mean "before Christ"?

\* \* \*

20. Suppose you arrange the following words so that they make a complete sentence. If it is a true statement, mark (T) in the brackets, if false, put an (F) in the brackets.

moss A stone gathers rolling

\* \* \*

22. Two of the following proverbs have similar meanings. Which ones are they?

1. Straws show which way the wind blows.
2. An empty sack can't stand straight.
3. No doctor at all is better than three.
4. All is not gold that glitters.
5. Too many cooks spoil the broth.

\* \* \*

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<sup>4</sup> The Company treated a score of 20 on the Wonderlic test as "passing" (Exhibit Volume, pp. 112b-113b). According to the publishers of the test, however, the passing score for *skilled mechanics* and *sub-foremen* is 18 and for other categories of industrial employees it is lower. E. F. Wonderlic, *Wonderlic Personnel Test Manual*, page 5 (E. F. Wonderlic Associates, Inc. 1966). Thus, the Company denied Negroes access to jobs considerably less challenging than that of a skilled mechanic unless they achieved scores higher than that which the publisher considers necessary to qualify as a skilled mechanic.

43. Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory? All good things are cheap, all bad things very dear. Goodness is simple; badness is manifold.

\* \* \*

47. Two of the following proverbs have similar meanings. Which ones are they?

1. Perfect valor is to do without witnesses what one would do before the world.
2. Valor and boastfulness never buckle on the same sword.
3. The better part of valor is discretion.
4. True valor lies in the middle between cowardice and rashness.
5. There is a time to wink as well as to see.

\* \* \*

These questions *perhaps* might have utility on a law school aptitude exam. As a measure of ability to fill jobs in an industrial plant they are ludicrous. And as a barrier to Negro advancement they are vicious—the more so because employers are growing increasingly enamored of these kinds of tests, and Wonderlic is one of the most popular.

The court below has held that the use of this test does not violate Title VII, absent evidence that it was adopted *for the purpose of* discriminating. That holding, if not reversed, will cripple Title VII. Too often employers, whether for non-discriminatory reasons or for discriminatory reasons which could never be proved, elect to staff their plants with employees who are super-qualified. In such cases, the plaintiffs will be able to prove disastrous effects upon the job opportunities of minority employees, and lack of business necessity, but not improper motivation.

Petitioners have set forth solid legal grounds why the decision below should be reversed. No point would be served by our duplicating that showing. We merely wish to apprise the Court of what thirty-four years of representation in the metals industries has taught the Steelworkers: unless this Court strikes down non-job-related tests and standards, the unhappy plight of minority employees in American industry cannot end.<sup>5</sup>

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<sup>5</sup> In our motion for leave to file this brief, *supra*, we recount USWA's partial success in securing abolition of non-job-related tests through collective bargaining. While the collective bargaining process obviously affords hope for alleviating this problem, it can never be the total answer. Too many employees—numbering in the millions—are not represented by unions and thus have no mechanism, other than Title VII, for securing relief from these evils. And even collective bargaining can do the job only where the employer voluntarily agrees to the union's demands for abolition of non-job-related standards, or where the employees' bargaining strength is sufficient to exact such an agreement.



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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
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**REPLY BRIEF FOR PETITIONERS**

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**Argument**

The respondents in the lower courts in this case succeeded in reducing Title VII to dealing only with situations where there is a showing of racial animus and they continue to pursue that notion in their briefs here. This approach has been rejected by the vast majority of District Courts and Courts of Appeals, which have made it clear that the focus must be on the impact and effect of practices rather than merely the motivation behind those practices. Where an apparently neutral practice has a serious discriminatory impact and effect, it has repeatedly been held to violate Title VII unless a continuation of the practice is necessitated by the employer's job performance needs. These cases involved seniority, nepotism, and use of arrest rec-

ords, as well as tests, and they make it clear that to knowingly and consciously persist in a practice having discriminatory impact and not necessitated by job performance needs is to engage in discrimination within the meaning of Title VII. (See the discussion at pp. 25-28 of brief for Petitioner.)

Two important new decisions, released after the filing of our main brief, reaffirm and expand this body of authority supporting petitioners. First, in *Parham v. Southwestern Bell Telephone Co.*, 3 CCH Emp. Prac. Dec. ¶ 8021 (8th Cir. Oct. 28, 1970), the Court of Appeals reversed a District Court decision strongly relied upon in Brief for Respondent (p. 44-45). The District Court had supported the employer's use of a high school diploma requirement; but the Court of Appeals pointed out that the record contained insufficient data to rule on this point. 3 CCH Emp. Prac. Dec. at p. 6051. The Court of Appeals went on to hold that the recruitment system of the employer which appeared racially neutral was unlawful because of its statistical impact and effect. 3 CCH Emp. Prac. Dec. at p. 6050-51. The second new decision, *Hicks v. Crown Zellerbach Corp.*, 3 CCH Emp. Prac. Dec. ¶ 8037 (E.D. La. Nov. 6, 1970), is even more on point. The *Crown Zellerbach* case involved a use of the same Wonderlic and Bennett tests used by defendant Duke Power Co. here. The court plainly held that such tests could not be used unless justified by business necessity established after full study and evaluation. The court explained:

"Without such study, no employer can have any confidence in the reasonableness or validity of his tests; and he therefore cannot in good faith assert that business necessity demands that these tests of unknown value be used. *Title VII does not permit an employer to engage in unsubstantiated speculation at the expense of Negro workers.*

Since it is clear that Crown Zellerbach has engaged in no significant study to support its testing program, the program is unlawful." 3 CCH Emp. Prac. Dec. at p. 6108

Precisely the same analysis should be controlling here. In the present case, the discriminatory impact of the test/diploma requirement is clear and incontrovertible. The only justification for this requirement advanced by respondents is their wishful thinking, wholly unsubstantiated and, if anything, contradicted by the record. The decision below can be affirmed only if Title VII is to be narrowly limited to precluding only racially motivated practices—which as Judge Sobeloff, dissenting below, warns, would reduce the law to "mellifluous but hollow rhetoric."

The Brief for Respondent attempts to develop three arguments in support of its position: (I) that the test/diploma requirement is based upon "legitimate business purpose," (II) that the company's tests are privileged under § 703(h) of Title VII, and (III) that legal precedents do not support petitioner's position. As already explained in petitioner's main brief, each of these arguments is unfounded. However, we will briefly reply here to each of these arguments in the order set out by respondents.

*I. The record does not substantiate, and, if anything, contradicts respondent's claim that the test/diploma requirement is necessitated by its business needs.*

First, contrary to respondent's claim, their expert witness, Dr. Dannie Moffie, did *not* participate in establishing either the diploma or test requirement and he offered no conclusion that either of these requirements were necessitated by the company's job performance needs. (See Brief for Respondent at pp. 15-16, 18)

As to the high school diploma requirement, Dr. Moffie testified only that "the assumption is" that the requirement is job-related, not that he had verified or even supported the assumption (A. 181a). This is understandable since Dr. Moffie did not participate in establishing the requirement in the mid-1950's (A. 177a) and was never asked to ratify it. He was qualified as an expert only in "Industrial and Personnel Testing" (A. 164a). He was asked on direct examination to testify only to the appropriateness of the tests used by the company (R. 162a-175a). Respondents have tried to read an endorsement of their diploma requirement into Dr. Moffie's testimony, but he clearly did not give such endorsement. See Brief for Petitioner at page 42 n. 51.

As to the test requirement, on which Dr. Moffie did testify specifically, even the respondents are not able to claim that Dr. Moffie endorsed the requirement as being required by job performance needs. Rather, Dr. Moffie testified only that the test was a reasonable substitute for the diploma requirement (A. 180a-182a). He rendered no judgment on the reasonableness of the test as an independent requirement. This was a relatively easy judgment to make since test scores correlate well with academic level, as compared to their poor correlation with industrial job potential. Dr. Moffie could not responsibly comment on the test as an independent requirement in relation to job performance needs because of insufficient study and evaluation. See Brief for Petitioner at pp. 31-37.

Second, although the respondents make much of the fact that "minimum occupational scores in the utility industry" on the Wonderlic test generally coincide with the score required by the company, see Brief for Respondent at p. 18, this claim is fully nonsensical. These so-called "minimum occupational scores" are merely the "number of questions

correctly in 12 minutes reported by one or more companies participating in the study" (A. 138b). Since the Duke Power Co. participated in the study (A. 169a), these minimum scores may only be confirming what Duke itself reported. It is difficult to imagine a more obvious case of attempting to lift oneself by one's own bootstraps.

Thus, the only thing in the record truly offering any support for the company's diploma/test requirement is the testimony of its official, Mr. A. C. Theis.

As to the diploma requirement, Mr. Theis merely testified that the Company had found in the past that certain employees were unable to progress in certain jobs because of the limited reading and reasoning abilities. "This," he said, "was why we embraced the High School education as a requirement" (A. 93a). This fond hope was, and still is, unsupported by any study, evaluation, or substantiation. Mr. Theis did not even determine that the poor employees were non-high school graduates. The record indicates, if anything, that non-high school graduates are able to progress just as well and perform just as well in the jobs at the Duke Power Co. as high school graduates. See data cited in Brief for Petitioner at p. 37 n.47 and Brief for the United States as Amicus Curiae at p. 20 n.22. This data confirms findings made in numerous professional studies that requirements like that of a high school diploma bear no significant relationship to job success. See Brief for Petitioner at p. 37. As to the test requirement, the testimony of Mr. Theis is even weaker. He said only that he adopted these tests "because the white employees that happened to be in Coal Handling at the time, were requesting some way that they could get from Coal Handling into the Plant jobs. . . ." (A. 200a).

There may be other times and other places where the use of a diploma/test requirement can be justified despite its



gross discriminatory impact on black employees. However, it is intolerable that unsubstantiated speculation which is inconsistent with the facts in the record and which is based on a desire to help some white employees, should be accepted as a sufficient basis of justification.

The unreasonableness of permitting these requirements to stand in this case is further compounded by the fact that the primary effect of the requirements here is to deny black employees their only opportunity for good paying jobs. The good paying jobs which petitioners seek in the coal handling department are ones staffed primarily with non-high school graduates. These jobs were traditionally reserved for whites under the Duke Power Company's prior practice of naked racial segregation of jobs. Each of the petitioners has worked for many years for Duke in the traditionally black category of "semi-skilled laborer," performing a wide variety of mechanical and industrial tasks which are analogous to duties in the coal handling department. See Brief for Petitioner at pp. 39-41. The diploma/test requirement is the only thing standing between these blacks and a decent job opportunity. On the other hand, no white employee in the plant is cut off from a good paying job by the diploma/test requirement since all white employees are in departments which lead to well paying jobs. See Brief for Petitioner at pp. 4-7.<sup>1</sup>

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<sup>1</sup> Respondents argue that the number of Negroes affected by the test requirement was not disproportionately greater than the number of whites so affected, because the requirement applied to 11 Negroes and 9 whites. Brief for Respondent at p. 23. Respondent neglects to note, however, that all of the whites were in the coal handling department where they were eligible for promotion to jobs paying as much as \$3.31 per hour even if they failed to meet the diploma/test requirement, while all of the Negroes were in the labor department where they could expect to earn no more than \$1.895 per hour unless they met the diploma/test requirement (A. 72b). (The foreman job in the labor department is reserved for high school graduates (A. 63b). Thus the burden of the re-

*II. The respondents' tests are not given a privileged status by §703(h) of Title VII.*

Our view of the legislative history of the §703(h) is fully developed in our main brief (pp. 46-50), as well as in the brief for the United States as Amicus Curiae (pp. 21-30), the brief of the Attorney General of the State of New York as Amicus Curiae in Support of Reversal (pp. 15-20), and Judge Sobeloff's dissenting opinion below. We believe that this legislative history clearly shows that §703(h) was not intended to offer any protection for tests which are not justified by job performance needs. At the very least, however, the legislative history can be said to be conflicting and uncertain as to the precise nature of the justification required for test use. In such a situation, a subsidiary clause like §703(h) must be harmonized with the overall purpose of the statute and cannot be read to undercut that overall purpose as respondents suggest.

The one thing that is undisputably clear about §703(h) is that it was directed at the problem raised by the Motorola-Illinois FEPC case. This case involved a situation where tests were struck down because of their adverse impact on black applicants without considering whether in fact that adverse impact was related to Motorola's job performance needs. The question raised by that case was very different from that raised by this case where petitioners concede that job performance needs are a reasonable and acceptable justification for test use. Because of ambiguous draftsmanship, §703(h) could be read to apply to the problem

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quirement on the black employees is of a much different magnitude than that imposed on white employees. Moreover, even putting aside this differential burden, the imposition of a requirement which would adversely affect 11 blacks and 9 whites is disproportionately affecting the Negroes in the context of a plant with only 14 black employees and 81 white employees.

presented in this case, but to do so would take the provision out of its legislative context and cause a result which was not really being considered or focused upon by Congress in its consideration of §703(h). We submit that it would be a distortion of §703(h) to apply it to create a privileged status for the tests used in this case.

Subsequent legislative developments bear out petitioner's view of §703(h). The respondents have attempted to buttress their argument by referring to the fact that a May, 1968, amendment to Title VII requiring that tests be job-related was not enacted. Brief for Respondent at p. 35. Respondents' reliance is misplaced. First, the May, 1968 amendment was not defeated, as respondents claim, but rather was not acted upon by Congress. Since the amendment was only a minor part of a larger bill designed to give the Equal Employment Opportunity Commission cease and desist powers, the fact that the bill died without Congressional action can hardly be read to say much about the test amendment. Subsequently, on August 21, 1970 (after the filing of our main brief), the Senate Committee on Labor and Public Welfare reported out a new bill giving cease and desist powers to the Equal Employment Opportunity Commission. See S. Rep. No. 91-1137, 91st Cong., 2d Sess. (1970). The Committee report makes it clear that this new bill is directed at precisely the kind of problem raised in this case.

"In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. It was thought that a scheme that stressed conciliation rather than compulsory processes would be most appropriate for the resolution of this essentially 'human' problem, and that litigation would be necessary only on an occasional

basis in the event of determined recalcitrance. This view has not been borne out by experience.

"Employment discrimination, viewed today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through various institutional devices, and *testing and validation requirements*. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful."

The Committee report goes on to explain that this recognition of the scope of discrimination requires the creation of an expert commission with cease and desist powers. However, and this is the crucial point for us, the Committee did not think it necessary to include any significant amendment in the substantive violation provisions of Title VII in order to enable this commission to accomplish its purposes. *In other words, the Senate Committee believed that discriminatory "systems" and "effects" were already covered by the substantive provisions of the Act.* The bill proposed by this Committee report was passed by the whole Senate in September, 1970. — Cong. Rec. — (daily ed. September, 1970).

A similar bill has also been reported out of Committee in the House of Representatives. The House bill specifically requires that tests be "directly related to the determination of bona fide occupational qualifications reasonably necessary

to perform the normal duties of the particular position concerned." H. R. Rep. No. 91-1434, 91st Cong., 2d Sess. 23 (1970). *The House Committee report makes it clear that the present language of Title VII already requires that tests be related to job performance needs, but that this amendment is necessary to legislatively overrule the misinterpretation given the statute by the Court of Appeals in this case below. Id. at 10-11.* At this date, the House bill is pending in the Rules Committee. Because of the vagaries of the legislative process, the eventual outcome of this legislation giving cease and desist powers to the EEOC will have to await further developments. Whatever the outcome, however, the crucial lesson for this case is that the substantive committees of both houses of Congress and the entire Senate are on record as supporting the interpretation of Title VII being advanced by petitioners in this case. If subsequent legislative developments are ever to cast any light on the proper interpretation of a statute, it is clear that this case presents the strongest possible instance of such subsequent legislative development supporting the petitioners' position.

### III. *The legal precedents support the petitioner's position.*

First, contrary to respondents' claim, it is clear that the Equal Employment Opportunity Commission opposes the imposition of tests and/or diploma requirements under circumstances such as those presented here. This is made clear in the Amicus brief filed by the Solicitor General on behalf of the EEOC. Moreover, the EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (Aug. 1, 1970) are unmistakable in this regard. The EEOC guidelines cover both tests and educational requirements. See *id.* at §1609.2. In this regard, the EEOC is fully supported by the Office of Federal Contract Compliance in its

order covering Validation of Tests by Contractors and Sub-contractors, 33 Fed. Reg. 14392 (1968).

Furthermore, it is clear that the decisions in numerous analogous cases below affirm the correctness of petitioners' interpretation of Title VII. On the specific question of tests, the decisions in *Hicks v. Crown Zellerbach Corp.*, 3 CCH Emp. Prac. Dec. ¶8037 (E.D. La. Nov. 6, 1970) (discussed at p. 2 *supra*) and *Arrington v. Massachusetts Bay Transportation Authority*, 306 F. Supp. 355 (D. C. Mass. 1969), are foursquare in requiring substantial study and evaluation to justify use of tests having a discriminatory impact. To the same effect is *Dobbins v. Electrical Workers Local 212*, 292 F. Supp. 413 (S. D. Ohio 1968). Respondents attempted to distinguish *Dobbins* on the ground that the purpose of the tests there was to discriminate. However, among the things held unlawful in *Dobbins* was a test which the court acknowledged to be "objectively fair and objectively fairly graded" on the ground that it was unnecessarily difficult. *Id.* at 433-34. That of course is the precise problem here: the test is unnecessarily and unreasonably difficult in relation to many, if not all, of the jobs to which it applies. It is also clear that numerous cases involving analogous practices, rather than tests as such, support petitioners' position. Thus, in striking down the use of arrest records as a hiring criterion, the court in *Gregory v. Litton Systems, Inc.*, 63 Lab. Cas. ¶9485 held:

"In a situation of this kind, good faith in the origination or application of the policy is not a defense. An intent to discriminate is not required to be shown so long as the discrimination shown is not accidental or inadvertent. The intentional use of a policy which in fact discriminates between applicants of different races and can reasonably be seen so to discriminate, is interdicted by the statute, unless the employer can show

a business necessity for it. In this context, 'business necessity' means that the practice or policy is essential to the safe and efficient operation of the business. *Papermakers Local 189 v. United States* [416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970)] As previously stated, no such justification or necessity has been shown for the policy involved in this case."

Similarly, in cases involving seniority and nepotism the courts have found that the particular practices involved were adopted innocently by the employer and bore some relationship to the employer's business. However, requirements were struck down under Title VII because the employer's business interests could be adequately protected by excluding unqualified employees without the imposition of an arbitrary requirement which had a great discriminatory impact on black workers. See *Local 189, United Papermakers and Paper Workers v. United States*, 416 F. 2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970); *United States v. Sheetmetal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969). This point is more fully described and documented in our main brief at pp. 22-29.

## CONCLUSION

Respondent's brief persists in misconceiving the issue raised by this case. The company believes that we seek to "attribute to the respondent a base motive and sinister intent to discriminate against its Negro employees." Brief for Respondent at p. 54. As we have tried to make clear, that is not our purpose. It would serve the interests of no one if Title VII were reduced to a statute requiring claims of malice and sinister intent to be established. Rather, it is petitioners' position that respondents have taken a set of requirements which are neutral on their face and may be

reasonably applied in certain situations, and misapplied those requirements to the disadvantage of its black workers in the Labor Department. This misapplication of a neutral practice, whether maliciously intended or not, has the effect of and does discriminate within the meaning of Title VII. It has *denied* petitioners the opportunity which Title VII extends to every man and woman—the right to be judged on his or her own individual merits rather than under arbitrary and discriminatory requirements. It should be declared unlawful.

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## SUPREME COURT OF THE UNITED STATES

No. 124.—OCTOBER TERM, 1970

Willie S. Griggs et al.,	} On Writ of Certiorari to the	
Petitioners,		United States Court of
v.		Appeals for the Fourth
Duke Power Company.	} Circuit.	

[March 8, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.<sup>1</sup>

<sup>1</sup> The Act provides:

"Sec. 703 (a) It shall be an unlawful employment practice for an employer—

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

"(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . .

Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act and this proceeding was brought by a group of incumbent Negro employees against Duke Power Company. All the petitioners are employed at the Company's Dan River Steam Station, a power generating facility located at Draper, North Carolina. At the time this action was instituted, the Company had 95 employees at the Dan River Station, 14 of whom were Negroes; 13 of these are petitioners here.

The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Test. Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four "operating" departments in which only whites were employed.<sup>2</sup> Promotions were normally made within each department on the basis of job seniority. Transferees into a department usually began in the lowest position.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from the Coal

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to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin. . . ."

<sup>2</sup> A Negro was first assigned to a job in an operating department in August 1966, five months after charges had been filed with the Equal Employment Opportunity Commission. The employee, a high school graduate who had begun in the Labor Department in 1953, was promoted to a job in the Coal Handling Department.

Handling to any "inside" department (Operations, Maintenance, or Laboratory). When the Company abandoned its policy of restricting Negroes to the Labor Department in 1965, completion of high school also was made a prerequisite to transfer from Labor to any other department. From the time the high school requirement was instituted to the time of trial, however, white employees hired before the time of the high school education requirement continued to perform satisfactorily and achieve promotions in the "operating" departments. Findings on this score are not challenged.

The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement. In September 1965 the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal Handling to an "inside" job by passing two tests—the Wonderlic Personnel Test, which purports to measure general intelligence, and the Bennett Mechanical Aptitude Test. Neither was directed or intended to measure the ability to learn to perform a particular job or category of jobs. The requisite scores used for both initial hiring and transfer approximated the national median for high school graduates.<sup>3</sup>

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<sup>3</sup> The test standards are thus more stringent than the high school requirement, since they would screen out approximately half of all high school graduates.

The District Court had found that while the Company previously followed a policy of overt racial discrimination in a period prior to the Act, such conduct had ceased. The District Court also concluded that Title VII was intended to be prospective only and, consequently, the impact of prior inequities was beyond the reach of corrective action authorized by the Act.

The Court of Appeals was confronted with a question of first impression, as are we, concerning the meaning of Title VII. After careful analysis a majority of that court concluded that a subjective test of the employer's intent should govern, particularly in a close case, and that in this case there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements. On this basis, the Court of Appeals concluded there was no violation of the Act.

The Court of Appeals reversed the District Court in part, rejecting the holding that residual discrimination arising from prior employment practices was insulated from remedial action.<sup>4</sup> The Court of Appeals noted, however, that the District Court was correct in its conclusion that there was no finding of a racial purpose of invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and

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<sup>4</sup> The Court of Appeals ruled that Negroes employed in the Labor Department at a time when there was no high school or test requirement for entrance into the higher paying departments could not now be made subject to those requirements, since whites hired contemporaneously into those departments were never subject to them. The Court of Appeals also required that the seniority rights of those Negroes be measured on a plantwide, rather than a departmental, basis. However, the Court of Appeals denied relief to the Negro employees without a high school education or its equivalent who were hired into the Labor Department after institution of the educational requirement.

Negroes alike. It held that, in the absence of a discriminatory purpose, use of such requirements was permitted by the Act. In so doing, the Court of Appeals rejected the claim that because these two requirements operated to render ineligible a markedly disproportionate number of Negroes, they were unlawful under Title VII unless shown to be job-related.<sup>5</sup> We granted the writ on these claims. 399 U. S. 926.

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites fare far better on the Company's alternative requirements" than Negroes.<sup>6</sup> This consequence would appear

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<sup>5</sup> One member of that court disagreed with this aspect of the decision, maintaining, as do the petitioners in this Court, that Title VII prohibits the use of employment criteria which operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used.

<sup>6</sup> In North Carolina, 1960 census statistics show that, while 34% of white males had completed high school, only 12% of Negro males had done so. U. S. Bureau of the Census, U. S. Census of Population: 1960, Vol. 1, Part 35, Table 47.

Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by the Company in the instant case, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Decision of EEOC, CCH Empl. Prac. Guide, ¶ 17,304.53 (Dec. 2, 1966). See also Decision of EEOC 70-552, CCH Empl. Prac. Guide, ¶ 6139 (Feb. 19, 1970).

to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States*, 395 U. S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity only in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

✓ On the record before us, neither the high school completion requirement nor the general intelligence test is

shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability. Rather, a vice president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.<sup>7</sup> The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long range requirements fulfill a genuine business need. In the present case the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

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<sup>7</sup> For example, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

✓ The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress had mandated the common-sense proposition that they are not to become masters of reality.

The Company contends that its general intelligence tests are specifically permitted by § 703 (h) of the Act.<sup>8</sup> That section authorizes the use of "any professionally developed ability test" that is not "designed, intended, or used to discriminate because of race . . . ." (Emphasis added.)

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703 (h) to permit only the use of job-related tests.<sup>9</sup> The administrative interpretation of the

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<sup>8</sup> Section 703 (h) applies only to tests. It has no applicability to the high school diploma requirement.

<sup>9</sup> EEOC Guidelines on Employment Testing Procedures, issued August 24, 1966, provide:

"The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the



Act by the enforcing agency is entitled to great deference. See, e. g., *United States v. City of Chicago*, — U. S. — (No. 386, O. T. 1970); *Udall v. Tallman*, 380 U. S. 1 (1965); *Power Reactor Co. v. Electricians*, 367 U. S. 396 (1961). Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the Guidelines as expressing the will of Congress.

Section 703 (h) was not contained in the House version of the Civil Rights Act but was added in the Senate during extended debate. For a period, debate revolved around claims that the bill as proposed would prohibit all testing and force employers to hire unqualified persons simply because they were part of a group formerly subject to job discrimination.<sup>10</sup> Proponents of Title VII

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applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII."

The EEOC position has been elaborated in the new Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (August 1, 1970). These Guidelines demand that employers using tests, have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job or jobs for which Guidelines are being evaluated." *Id.*, at § 1607.4 (c).

<sup>10</sup> The congressional discussion was prompted by the decision of a hearing examiner for the Illinois Fair Employment Commission in *Myart v. Motorola Co.* (The decision is reprinted at 110 Cong. Rec. 5662 (1964).) That case suggested that standardized tests on which whites performed better than Negroes could never be used. The decision was taken to mean that such tests could never be justified even if the needs of the business required them. A number of Senators feared that Title VII might produce a similar result. See remarks of Senators Ervin, 110 Cong. Rec. 5614-5616; Smathers, *id.*, at 5999-6000; Holland, *id.*, at 7012-7013; Hill, *id.*, at 8447; Tower, *id.*, at 9024; Talmadge, *id.*, at 9025-9026; Fulbright, *id.*, at 9599-9600; and Ellender, *ibid.*

sought throughout the debate to assure the critics that the Act would have no effect on job-related tests. Senators Case of New Jersey and Clark of Pennsylvania, comanagers of the bill on the Senate floor, issued a memorandum explaining that the proposed Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, *must meet the applicable job qualifications*. Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." (Emphasis added.) 110 Cong. Rec. 7247.<sup>11</sup> Despite these assurances, Senator Tower of Texas introduced an amendment authorizing "professionally developed ability tests." Proponents of Title VII opposed the amendment

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<sup>11</sup> The Court of Appeals majority, in finding no requirement in Title VII that employment tests be job-related, relied in part on a quotation from an earlier Clark-Case interpretative memorandum addressed to the question of the constitutionality of Title VII. The Senators said in that memorandum:

"There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance." 110 Cong. Rec. 7213.

However, nothing there stated conflicts with the later memorandum dealing specifically with the debate over employer testing, 110 Cong. Rec. 7247 (quoted from in the text above), in which Senators Clark and Case explained that tests which measure "applicable job qualifications" are permissible under Title VII. In the earlier memorandum Clark and Case assured the Senate that employers were not to be prohibited from using tests that determine *qualifications*. Certainly a reasonable interpretation of what the Senators meant, in light of the subsequent memorandum directed specifically at employer testing, was that nothing in the Act prevents employers from requiring that applicants be fit for the job.

because, as written, it would permit an employer to give any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute." Remarks of Senator Case, 110 Cong. Rec. 13504.

The amendment was defeated and two days later Senator Tower offered a substitute amendment which was adopted verbatim and is now the testing provision of § 703 (h). Speaking for the supporters of Title VII, Senator Humphrey, who had vigorously opposed the first amendment, endorsed the substitute amendment, stating: "Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title." 110 Cong. Rec. 13724. The amendment was then adopted.<sup>12</sup> From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703 (h) to require that employment tests be job-related comports with congressional intent.

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has

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<sup>12</sup> Senator Tower's original amendment provided in part that a test would be permissible "if . . . in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is suitable or trainable with respect to his employment in the particular business or enterprise involved . . . ." 110 Cong. Rec. 13492. This language indicates that Senator Tower's aim was simply to make certain that job-related tests would be permitted. The opposition to the amendment was based on its loose wording which the proponents of Title VII feared would be susceptible to misinterpretation. The final amendment, which was acceptable to all sides, could hardly have required less of a job relation than the first.

not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

The judgment of the Court of Appeals is, as to that portion of the judgment appealed from, reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

